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Supreme Court of the United States

OCTOBER TERM, 1965/1966

No. 963 67

HELEN MAXINE LEVI TRAVIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 28, 1966
CERTIORARI GRANTED APRIL 18, 1966

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1965~~ 1966

No. ~~963~~ 67

HELEN MAXINE LEVI TRAVIS, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Original	Print
Record from U.S.D.C., Southern California, Central Division		
Indictment	2	1
Arraignment	5	3
Notice of motion to dismiss indictment	6	3
Memorandum of points and authorities in support	8	5
Waiver of defendant's presence	25	19
Plea	26	20
Minute entry of hearing of cause	27	20
Opposition to motion to dismiss indictment	28	21
Points and authorities in support	29	22
Minute entry setting motion to dismiss for hearing	43	33
Defendant's reply to opposition to motion to dismiss	44	33
Minute entry continuing hearing on motion to dismiss	53	41
Minute entry of hearing motion to dismiss	54	41

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 15, 1966

	Original	Print
Record from U.S.D.C., Southern California, Central Division—Continued		
Memorandum opinion and order denying defendant's motion to dismiss	55	42
Waiver of trial by jury and waiver of special findings of fact	62	48
Stipulation of facts	63	49
Minute entries of waiver of jury trial, etc.	67	53
Memorandum in support of motion for judgment of acquittal	68	54
Appendix "A"—Public Law 179	90	73
Appendix "B"—Press Release No. 29	91	74
Plaintiff's opposition to defendant's motion for judgment of acquittal	93	75
Attachment—Letter dated January 16, 1961 from John W. Hanes, Jr., to Loy W. Henderson	104	84
Defendant's reply memorandum	106	85
Memorandum opinion on finding defendant guilty as charged	117	94
Memorandum re opinion and finding of guilt	124a	101
Judgment and sentence	125	102
Notice of appeal	126	103
Designation of record on appeal	129	104
Proceedings in the United States Court of Appeals for the Ninth Circuit		
Statement of points on appeal	133	106
Order of submission	137	107
Order revoking submission	138	107
Order directing filing of opinion and filing and recording of judgment	139	108
Opinion, per curiam	140	109
Judgment	143	112
Order denying petition for rehearing	141	113
Clerk's certificate (omitted in printing)	145	113
Order allowing certiorari	146	113

[fol. 2]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

February 1963 Grand Jury

No. 32380 CD

UNITED STATES OF AMERICA, Plaintiff,

v.

HELEN MAXINE LEVI TRAVIS, Defendant.

INDICTMENT [8 UNITED STATES CODE § 1185(b)—UNLAWFUL DEPARTURE FROM THE UNITED STATES]—Filed June 21, 1963

The Grand Jury charges:

Count One

[8 U.S.C. § 1185(b)]

That on or about January 22, 1962, at which time there was in force and effect a state of national emergency proclaimed by the President of the United States, Helen Maxine Levi Travis, the defendant herein, then and there being a citizen of the United States, and not being within any of the exceptions contained in the regulations duly issued and promulgated under Section 1185(b) of Title 8, United States Code, to wit: 22 C.F.R. 53.2 and 53.3, at the Los Angeles Airport, Los Angeles, California, within the Southern District of California, did unlawfully, knowingly and willfully depart from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico, the Republic of Cuba being a place outside the United States for which a

[fol. 3] valid passport is required under the aforesaid regulations.

In violation of Section 1185(b) of Title 8, United States Code.

[fol. 4] **Count Two**

[8 U.S.C. § 1185(b)]

That on or about August 18, 1962, at which time there was in force and effect a state of national emergency proclaimed by the President of the United States, Helen Maxine Levi Travis, the defendant herein, then and there being a citizen of the United States, and not being within any of the exceptions contained in the regulations duly issued and promulgated under Section 1185(b) of Title 8, United States Code, to wit: 22 C.F.R. 53.2 and 53.3, at San Ysidro, California, within the Southern District of California, did unlawfully, knowingly and willfully depart from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico, the Republic of Cuba being a place outside the United States for which a valid passport is required under the aforesaid regulations.

In violation of Section 1185(b) of Title 8, United States Code.

A True Bill

Everett L. Wilshie, Foreman.

Francis C. Whelan, United States Attorney.

[fol. 5]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

ARRAIGNMENT—July 22, 1963

Defendant is arraigned and states his true name is as set forth in the Indictment.

Court Orders this case continued to August 5, 1963 at 9:30 A.M. for plea.

[File endorsement omitted]

[fol. 6]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

NOTICE OF MOTION TO DISMISS INDICTMENT—
Filed September 9, 1963

To the Plaintiff, the United States of America, and to Francis C. Whelan, Esq., United States Attorney, Southern District of California:

Please Take Notice that on October 7th, 1963, at 2:00 P.M., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Thurmond Clarke, plaintiff will move the above entitled court to dismiss the indictment herein on the grounds that the indictment fails to charge an offense in that:

[File endorsement omitted]

1. There is no legislative authority for prohibiting or regulating travel to Cuba or in any way limiting travel on a geographic basis.

2. To the extent that the statute (8 USC § 1185[b]) purports to authorize the Executive Department to prohibit or regulate travel to Cuba or in any way limit travel on a geographic basis, it delegates legislative power contrary to Article I, Section 8 of the Constitu-
[fol. 7] tion of the United States.

3. As construed and applied herein, to authorize the Executive Department to prohibit or regulate travel to Cuba or in any way limit travel on a geographic basis, the statute (8 USC 1185[b]) is fatally vague contrary to the First and Fifth Amendments to the Constitution of the United States.

4. The statute upon which the indictment rests as here applied deprives defendant of liberty without due process of law and contrary to the Fifth Amendment to the Constitution of the United States in that the factual premises found by the President's Proclamations in 1953 and 1950 (Procl. No. 3004, 67 Stat C 31; Procl. No. 2914, 64 Stat A 454) and upon which the operativeness of the statute depends are not, as of the date alleged in the indictment and the date the indictment was found, true.

5. As construed and applied the statute (8 USC 1185[b]) and the regulations (22 C.F.R. 53.2 and 53.3) upon which the indictment rests deprive defendant of her right to travel contrary to the provisions of the First Amendment to the Constitution of the United States.

Dated at Los Angeles, California, September 9, 1963.

Marcus and McTernan, By: John T. McTernan, Attorneys for defendant, Helen Maxine Levi Travis.

[fol. 8]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 32380 CD

[Title omitted]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS INDICTMENT

1. *Preliminary.*

(a) *The Indictment, Statute, Regulations and Proclamations.*

The Indictment is in two counts. Each charges a violation of 8 USC 1185[b] and 22 C.F.R. 53.2 and 53.3, alleging that defendant departed, in January and August, 1962, respectively, from the United States for Cuba ("via Mexico"), the same being a place for which a valid passport is required, without bearing a valid passport. Time for plea has been continued to permit defendant to prepare and file her motion to dismiss.

The provisions of 8 USC 1185[b] are these:

> (b) *Citizens.* After such proclamation [of national emergency] as is provided for in subsection (a) of [fol. 9] this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided for by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter the United States unless he bears a valid passport.

[File endorsement omitted]

The national emergency requisite to the operation of the statute was proclaimed in December, 1950, (sic) in Presidential Proclamation No. 2914 (64 Stat A 454) and Presidential Proclamation No. 3004. (67 Stat C 31). In these proclamations the President made departure and entry of citizens and nationals of the United States from and into the United States "subject to the regulations prescribed by the Secretary of State and published as Sections 53.1 to 53.9 inclusive of Title 22 of the Code of Federal Regulations." These regulations first define the United States for the purposes at hand (Sec. 53.1) and restate the statutory proscriptions on departure from and entry into the United States as so defined (Sec. 53.2) and then state exceptions to the prohibition. (Sec. 53.3). In the last section cited passports are made unnecessary for citizens or nationals of the United States "when traveling between the United States and any country, territory or island adjacent thereto in North, Central or South America, *excluding Cuba.*" [emphasis added] The language referring to Cuba was added to the regulations on January 19, 1961. (26 Fed.Reg. 482).

In short the statute, which in terms requires passports as a condition of departure from or entry into the United States by its citizens and nationals, has been applied so as [fol. 10] to require passports for travel to or from certain areas and none for travel to or from others. The regulations here involved purport to exercise authority to regulate, control or restrict, on a geographic basis, travel by United States citizens and nationals.

At the time that Section 53.3(b), *supra,* was amended to restrict travel to Cuba, the Secretary of State issued Public Notice 179 (26 Fed.Reg. 492) which, *inter alia,* advised that in future passports valid for travel to Cuba must be specifically endorsed for such travel. In another notice [State Department Press Release No. 729, dated December 13, 1962] the Secretary prescribed that such endorsement would be given only in the event the applicant affirmatively showed that his travel might be "regarded as in the best

interests of the United States", such as "newsmen and businessmen with previously established interests." Defendant, neither at the times alleged in the indictment nor thereafter, fell into these categories.

(b) *The gist of the charge.*

From the foregoing review it is evident that, the asserted national emergency having been declared back in 1950 and 1953, 8 USC 1185[b] has been used in 1961 to fashion a prohibition upon travel to or from Cuba by citizens or nationals of the United States. The indictment makes it irrefutably plain that defendant is charged with violating that prohibition. Travel to Cuba is forbidden; travel to Cuba is the alleged offense.[1]

[fol. 11]

2. *There is no legislative authority for prohibiting or regulating travel to Cuba or in any way limiting travel on a geographic basis.*

It is by now established that the right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law. *Kent* v. *Dulles*, 357 U.S. 116, 125; 2 L.ed. 1204, 1210. The societal significance of this liberty ranks with its cognate freedoms under the First Amendment whereby the sovereign people may be vouchsafed access to information needful to the discharge of their function in a representative government. *Kent* v. *Dulles*, 357 U.S. at 126, 127; 2 L.ed.2d at 1210, 1211. The rights

[1] We recognize, of course, that travel to Cuba is not absolutely forbidden. It is possible and permissible with a "specifically endorsed" passport. But for the ordinary citizen whose desire is merely to observe that his views may be "enriched" beyond "what he is told by officials of our government or by a few correspondents of American newspapers" (Chafee, *Three Human Rights in the Constitution of 1781* [1956], quoted in *Kent* v. *Dulles*, 357 U.S. 116, 127; 2 L.ed. 2d 1204, 1211), the proscription is complete. The exercise of such personal liberties does not satisfy the Secretary's standards of serving the national interest.

here involved are "of comparable magnitude" with those of the citizens excluded from their homes and restricted of their freedom of movement in *Korematsu* v. *U.S.*, 323 U.S. 214, 89 L.ed. 194. Thus viewed, these rights may be curtailed only upon a showing of the "gravest imminent danger to the public safety." *Kent* v. *Dulles*, 357 U.S. at 128, 129; 2 L.ed. 2d at 1211, 1212. Thus legislation which would "trench so heavily on the rights of the citizen" as to restrict his freedom of travel is subject to the rule of strict construction. *Kent* v. *Dulles*, 357 U.S. at 129; 2 L.ed. 2d at 1212.

In this branch of the argument, we deal not with the extent to which the Congress may restrict the right to [fol. 12] travel on a geographic basis. Rather are we concerned with whether such authority has been given at all. It is in this context that the rule of strict construction must be applied.

There is nothing on the face of the statute authorizing geographic restrictions upon the right to travel. Its history gives no indication that such a power was ever entertained by those who drafted it. The statute (8 USC 1185[b]) is part of the Immigration and Naturalization Act of 1952, carried therein as Section 215. The Committee Report (H.R. Rep. No. 1356, 82nd Cong., 2d Sess., 1953) says of this provision merely that its language is in practically the same form as predecessor statutes on the same subject. The first of these was the Act of May 22, 1918 (40 Stat. 559) passed during World War I. It required a passport for a citizen to enter or leave the country. It was operative only during the war time and was terminated March 3, 1921. (41 Stat. 1359.) This statute was amended in 1941 to meet the needs of the country during World War II. (55 Stat. 252.) It was invoked by Presidential Proclamation No. 2523, dated November 14, 1941. (55 Stat. 1696), the emergency proclaimed thereby was continued until April 1, 1953, and the statutory provisions were extended until that date as well. (Proc. 2974, 66 Stat. C 31; 66 Stat. 54, 57, 96, 127, 330, 333.) The purpose of the predecessor

legislation was plainly to prevent the crossing of American borders in times of war, for the purpose of committing such crimes as espionage, disaffection in the armed forces and related activities, including the transfer of important military information on the country's war effort. These objectives are made plain in the report of the House Foreign Affairs Committee on the 1918 bill (H.R. Rep. No. 485, 65 Cong. 2d Sess., 2, 3.) The Senate report on the 1941 legislation was to similar effect. (S. Rep. No. 444, 77 Cong. 1st Sess., 1, 2.) The congressional debates are [fol. 13] consistent with this statement of purpose. (87 Cong.Rec. 5048-5053, 5386-5388.) As was pointed out by the minority in *Kent, supra,* the effect of the 1918 and 1941 legislation was a complete change in the emphasis of passport function from that of affording protection to the individual holder to safeguarding the security of the country. (357 U.S. at 137, 2 L.ed. 2d at 1216.)

The enactment of 8 USC 1185[b] in language virtually identical with the earlier statutes and against their background of purpose, *and without any observations in the Committee's report indicating a different or enlarged purpose,* would seem to afford strong basis for the conclusion that Congress intended by the present statute no greater or different control over the travel of American citizens and nationals than it had authorized in the past.

This conclusion takes greater force from the observations of the majority in *Kent, supra,* to the effect that the power actually exercised by the Secretary over passports had been used quite narrowly. It was there observed that passport refusals had fallen into two categories: (a) refusals based upon the non-citizenship or non-allegiance of the applicant to the United States (this based upon 22 USC 212 limiting passports to those "owing allegiance, whether citizen or not, to the United States"); and (b) the applicant's participation in unlawful conduct, his efforts to escape the law, promoting passport frauds, or otherwise engaging in conduct violating the laws of the United States.

In short, nowhere in the history of legislation affecting the issuance or refusal of passports has there been either

in statutory language, administrative regulations or administrative practice any use of these powers to restrict travel on a geographic basis. The statute here involved, then, is found in a setting completely alien to the notion [fol. 14] of geographic restriction upon the right to travel. So far as our research has enlightened us, in the nearly half century since the passage of the 1918 statute, there has been no effort, by prosecution or otherwise, to declare areas of the world out of bounds to citizens or nationals of the United States. This effort has arisen only since 8 USC 1185[b] has, by virtue of the 1961 amendment to the Secretary's Regulations, been enlisted to implement our political differences with the Republic of Cuba.

In view of the importance of the right to travel here involved, the rule of strict construction imposed by the *Kent* decision requires that the statute be read as not conferring the power which the Secretary here would exercise.

3. *To the extent that the statute (8 USC 1185[b]) purports to authorize the Executive Department to prohibit or regulate travel to Cuba or in any way limit travel on a geographic basis, it delegates legislative power contrary to Article I, §8 of the Constitution of the United States.*

Obviously the Secretary in promulgating 22 C.F.R. 53.3(b) relies upon the language in 8 USC 1185[b], which reads, "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe." Plainly this language, read alone or in context of the full provision, is devoid of any standards whatever for the exercise of the President's powers here delegated to the Secretary. Specifically, the language will be searched in vain for any standards by which a power to limit the right to travel on a geographic basis can be derived.

In *Schechter* v. *United States*, 295 U.S. 495, 79 L.ed. 1570, and *Panama Refining Company* v. *Ryan*, 293 U.S. 388, 79 L.ed. 446, the statutes involved made elaborate declarations as to the national emergency which unquestionably [fol. 15] existed. In addition, the statutes and regulations

involved in those cases related exclusively to matters of business, not to the exercise of First Amendment rights. Nevertheless, the broad authority found by the courts to have been given to the President was held to constitute an unlawful delegation of authority. In the *Panama Refining* case, Chief Justice Hughes stated:

> "• • • It gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment." (*Id* at 415.)

and

> "If the Congress can make a grant of legislative authority of the sort attempted by section 9(c), we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission such as it may select or create for the purpose . . ." (*Id* at 420.)

This last passage is particularly applicable to the present case where it was not the President but the Secretary of State who declared what conduct was to be made illegal. The regulations here under attack—if they can be deemed to have the support of the Statute—must fall under Mr. Justice Cardozo's statement in *Schechter* v. *United States*, *supra*, at 551:

> "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and [fol. 16] vagrant, if I may borrow my own words in an earlier opinion. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 440."

In the *Kent* case, *supra*, the Secretary argued that the power delegated was in the field of foreign affairs, and that therefore the standards need not be as precise as in other

fields. Presumably the government will make the same argument here. To that offer we would offer the Supreme Court's answer in *Kent:*

> "* * * If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress. *Youngstown Sheet & Tube Co.* v. *Sawyer, supra.* And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. See *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 420-430. Cf. *Cantwell* v. *Connecticut,* 310 U.S. 296, 307; *Niemotko* v. *Maryland,* 340 U.S. 268, 271. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. See *Ex parte Endo,* 323 U.S. 283, 301-302. Cf. *Hannegan* v. *Esquire, Inc.,* 327 U.S. 146, 156; *United States* v. *Rumely,* 345 U.S. 41, 46. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen." (*Kent* v. *Dulles,* supra, at 129).

In addition it cannot be argued that a vague standard rather than a precise one would suffice here, because there [fol. 17] is *no* standard prescribed by the statute, vague or precise. Further, the power exercised in the instant case is not the power over foreign affairs but the power over internal security.

This is not a case involving the negotiation of treaties or other executive action in the field of foreign relations. This case involves private rights and personal liberties. Since the exercise of these rights and liberties is here claimed to be criminal, this court will even more carefully than usual scrutinize the standards relied on. If they were inadequate by the approach laid down in *Kent* v. *Dulles, supra, a fortiori* they are inadequate in this criminal proceeding.

4. *As construed and applied herein, to authorize the Executive Department to prohibit or regulate travel to Cuba,*

or in any way limit travel on a geographic basis, the statute (8 USC 1185[b]) is fatally vague contrary to the First and Fifth Amendments to the Constitution of the United States.

We deal again with the same language in 8 USC 1185[b] pertaining to the exceptions and limitations which the President may make to the broad proscription of that statute. On its face, the statute prohibits departures and entries without passports with unspecified and unparticularized exceptions. The very absence of standards prevents the citizen from knowing what departures or entries, to what places or from what places, and under what conditions, are either permitted or prohibited.

To construe a statute making entry and exit illegal without a passport, so that it becomes illegal to travel to particular countries, is to make the statute constitutionally deficient for vagueness. The use of a term that is so vague and indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* [fol. 18] v. *General Construction Company*, 269 U.S. 385, 391; 70 L.ed. 322, 328; see also *Small* v. *American Sugar Refining Company*, 267 U.S. 233, 238-240; 69 L.ed. 589, 593-594. The vagueness of the regulations is especially pernicious where, as here, First Amendment rights are involved. *Burstyn* v. *Wilson*, 343 U.S. 495: 96 L.ed. 1100; *Winters* v. *New York*, 333 U.S. 507; 92 L.ed. 840; *Niemotko* v. *Maryland*, 340 U.S. 268; 95 L.ed. 267; *Kunz* v. *New York*, 340 U.S. 290; 95 L.ed. 280.

5. *The statute upon which the indictment rests as here applied deprives defendant of liberty without due process of law contrary to the Fifth Amendment to the Constitution of the United States in that the factual premises found by the President's Proclamations in 1953 and 1950 (Procl. No. 3004, 67 Stat C 31; Procl. No. 2914, 64 Stat A 454) and upon which the operativeness of the statute depends are not, as of the date alleged in the indictment and the date the indictment was found, true.*

The Secretary's actions in implementing the 1952 Immigration and Nationality Act are based upon Presidential Proclamation No. 2914 and No. 3004 (*supra*). No. 2914 (Dec. 16, 1950, 64 Stat A 454) opens in the following manner:

> "WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict;"

While there is general reference to "world conquest by Communist imperialism" and the importance of protecting the basic liberties of American citizenship of "reading and listening to what they choose, the right of free speech including the right to criticize their government," it is plain [fol. 19] that this proclamation is bottomed upon the Korean War. *Ibid.*

Three years later, on January 17, 1953, following the passage of the McCarran Act, Presidential Proclamation No. 3004, *supra,* was passed upon the basis that "the national emergency, the existence of which was proclaimed on December 16, 1950 by Proclamation 2914, still exists."

Whatever may have been the situation in 1950 and 1953, clearly that situation does not exist today. The Korean War, which was the explicit occasion for the invocation of travel controls, ended in 1953. There is, therefore, no rational basis for the interference with the basic right of movement upon the basis of an emergency no longer in existence.

It is true that serious controversies have arisen in the relationship between the Cuban Government and the United States Government. These have resulted in executive orders imposing controls over exports and imports, the establishment of blacklists and embargoes, and other measures, taken by the Government of the United States.[2] But it is sig-

---

[2] See, e.g., cut in Cuban sugar quota, Presidential Proclamation No. 3355 (July 7, 1960, 25 Fed.Reg. 6414) and supplemental

nificant that none of these measures asserts the existence of a national emergency, and that no proclamation has ever [fol. 20] issued under § 215 declaring that with respect to Cuba there is a national emergency.

The Government of Cuba, despite the breach in diplomatic relations, is still recognized by the Government of the United States. The calendars of state and federal courts are filled with litigation involving governmental agencies of the Republic of Cuba, sometimes as plaintiffs, sometimes as defendants. See, for example, *Banco Nacional de Cuba* v. *Sabbatino*, 307 F. 2d 845 (CA 2, 1962), cert. granted, 83 Sup. Ct. 717.

This court is not bound by a decade-old declaration of a national emergency which is inapplicable to the present situation and no longer exists. It has the authority to inquire as to whether there is in fact such a national emergency in existence today which can support this restriction upon civil liberty. In *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543, 89 L.ed. 207, Mr. Justice Holmes stated with respect to an emergency declaration by a legislature that,

> "* * * [A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . And still more obviously so far as this declaration looks to the future it can be no more prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. . . ." (*Id.* at 547-548.)

Presidential Proclamations No. 3383 (Dec. 19, 1960, 25 Fed.Reg. 13131); No. 3401 (April 4, 1961, 26 Fed.Reg. 2849); No. 3440, Dec. 5, 1961, 26 Fed.Reg. 11741); complete embargo on trade with Cuba, Presidential Proclamation No. 3447 (Feb. 6, 1962, 27 Fed. Reg. 1085); prohibition of assistance of Cuba and to any countries furnishing assistance to Cuba, Pub.L. 87-195, Pt. III, §620, Sept. 4, 1961, 75 Stat. 444, amended Pub.L. 87-565, Pt. III, §301(d), Aug. 1, 1962, 76 Stat. 260; quarantine on delivery of offensive weapons to Cuba, Presidential Proclamation No. 3504 (Oct. 24, 1962, 27 Fed. Reg. 10501).

In that case, the Court held that, had the case revolved around the existence of the emergency at the time of its consideration by the Supreme Court, it would have taken [fol. 21] judicial notice of the fact that there no longer existed in the District of Columbia a housing emergency sufficient to validate the Rent Control Act of 1919, as successively reenacted. It remanded the case to the trial court for a determination of the facts because the existence of the emergency at different times was deemed material.

In *East New York Savings Bank* v. *Hahn*, 326 U.S. 230, 90 L.ed. 34, Mr. Justice Frankfurter, in upholding the constitutionality of the 1943 extension of New York State's Moratorium Law, distinguished *Chastleton* as dealing with "quite a different situation." (*Id.* at 235.) The difference lay in the care and frequency with which the legislature had renewed the law from time to time, and adjusted its terms, based in each case on a full investigation of the facts:

> "The whole course of the New York moratorium legislation shows the empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts. . . ." (*Id.* at 234-235; see also *W.B. Worthen Co.* v. *Thomas*, 292 U.S. 426, 433, 78 L.ed. 1344, 1347.

In *Woods* v. *Miller*, 333 U.S. 138, 147, 92 L.ed. 596, 604, Mr. Justice Jackson's concurring opinion upholding federal rent control in 1948 denied, however, that "war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended."

The Court of Appeals for the Ninth Circuit, in a recent opinion upholding the judicial power to look behind a presidential declaration of national emergency relating to the possession of gold bullion, made an observation even more [fol. 22] striking in its applicability to personal liberties:

"It seems vital as a matter of national policy that emergency regulations and almost dictatorial powers granted or conceded in the turmoil of war, cold war, economic democratic revolution and the struggle to preserve a balanced way of life, should be discarded upon return to normal conditions, lest we grow used to them as the fittings of ordinary existence. Executive regulations drafted and confirmed for an emergency should expire with the emergency. There will be time enough to revivify these if another emergency require and Congress be willing. Of course, if it seems essential to continue the subject matter of these criminal regulations now, Congress can so declare. But the power lies in Congress." (*Bauer* v. *United States*, 244 F. 2d 794, 797.)

The lapse of time since the issuance of the proclamations here, together with the judicially noticeable matters set out in this branch of the argument, render the proclamations presumptively inoperative. Surely the changing kaleidoscopes of international relations and political maneuvers are not the sort of fact situations entitled to any presumption of continuance. Indeed, just the opposite of such a presumption would seem required. See, e.g. *Maggio* v. *Zeitz*, 333 U.S. 56, 92 L.ed. 476; *Colt* v. *United States*, 158 F. 2d 641 (CA 5; 1946); *United States* v. *Patterson*, 219 F. 2d 659 (CA 2, 1954).

In the event that the Court will not declare the proclamations ineffective upon the showing and argument here presented, request is hereby made for a hearing at which defendant will have full opportunity to present evidence that the declared emergency does not in fact exist.

6. *As construed and applied, the statute (8 USC 1185[b])* [fol. 23] *and the regulations (22 C.F.R. 53.2 and 53.3) upon which the indictment rests deprive defendant of her right to travel contrary to the provisions of the First Amendment to the Constitution of the United States.*

The societal significance of the right to travel has been delineated in the *Kent* opinion, *supra*. The assertion of executive power to place areas of the world and their experiments with different politico-economic systems off limits to the American electorate seems a particularly grave thrust at this great liberty. If as was once asserted First Amendment freedoms "embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period" (*Thornhill* v. *Alabama*, 310 U.S. 88, 102; 84 L. ed. 1093, 1102), they present themselves with an irresistible imperative here. Today our differences with Cuba are presented in a context of international conflict. Our national policy has been declared to treat Cuba as a pariah of the hemisphere and to be ready for armed conflict. Our President has openly offered moral, and impliedly offered material, support to those who would resort to war and invasion for the overthrow of the Cuban Government. There may be many in our citizenry who are not ready to lay down American lives for the right of Cuban emigres to march down the streets of Havana. Before such a perilous course is adopted, our people have a right to be informed, to see for themselves. Of even greater importance, the international contacts thus made can lead to understanding, to a basis for resolving conflict, to peace. Whether or not one can accept the present policies of our government toward Cuba, the demands of the First Amendment are that the people must be free to find for themselves the underlying facts and form for themselves their own opinions. It is a travesty [fol. 24] of representative government to enable its officials to fix policy and deny the people the opportunity to take their own look at the facts. When this denial carries the possibility of war waged without the knowing consent of the people, the travesty upon the premises of free government is complete.

Respectfully submitted,

Margolis and McTernan, By John T. McTernan, Attorneys for Defendant, Helen Maxine Levi Travis.

[fol. 25]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. CD 32380 Criminal

[Title omitted]

WAIVER OF DEFENDANT'S PRESENCE [RULE 43 FED. R. CR. PROC.]—Filed September 30, 1963

The undersigned defendant hereby waives the right to be present in person in open court upon the hearing of any motion or other proceeding in this cause, including when the case is ordered set for trial, when a continuance is ordered, and when any other action is taken by the court before, during or after trial, except upon arraignment, plea, empanelment of jury and imposition of sentence.

The undersigned defendant hereby requests the court to proceed during every absence of his which the court may permit pursuant to this waiver; and hereby agrees that his interests will be deemed represented at all times by the presence of his attorney the same as if the defendant himself were personally present in court; and further agrees to be present in person in court ready for trial any day and hour which the court may fix in his absence.

9/28/63

Helen Maxine Levi Travis, Defendant, 6324 Primrose Avenue, Los Angeles 28, California.

Approved 9/25/63

Margolis and McTernan, by John T. McTernan, Attorney for Defendant.

[File endorsement omitted]

[fol. 26]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

PLEA—September 9, 1963

Defendant pleads Not Guilty as to both counts of the indictment.

Court Orders case transferred to the calendar of Judge Crary for all further proceedings.

[File endorsement omitted]

[fol. 27]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MINUTE ENTRY OF HEARING OF CASE—September 3, 1963

Defendant is present with counsel and states defendant desires to file a motion to dismiss and counsel estimate hearing on said motion to take ½ to 1 hour to argue.

Court Orders hearing of said motion to dismiss be heard October 7, 1963 at 2 P.M. If defendant's motion to dismiss is denied the court will set the case for trial upon ruling on defendants motion to dismiss.

[File endorsement omitted]

[fol. 28]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

OPPOSITION TO MOTION TO DISMISS THE INDICTMENT
—Filed October 8, 1963

Plaintiff, the United States of America, opposes defendant Travis' Motion to Dismiss the Indictment on the following grounds:

1. There is legislative authority for regulating travel to Cuba.

2. Section 1185(b) of Title 8, United States Code, is not an unconstitutional delegation of legislative power.

3. The Statute and the Regulations are not void for vagueness.

4. There is still in existence a national emergency.

5. The Statute and the Regulations do not unconstitutionally deprive defendant of her right to travel.

Respectfully submitted,

Francis C. Whelan, United States Attorney;

Thomas R. Sheridan, Assistant United States Attorney, Chief, Criminal Section.

[File endorsement omitted]

[fol. 29]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

I

Preliminary Statement

On June 27, 1952, Congress enacted the Immigration and Nationality Act (66 Stat. 163), and in so doing Congress authorized the President to impose "restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States." (66 Stat. 190, 8, U.S.C. 1185a).

The Act has a condition precedent to imposing "restrictions and prohibitions": the United States being at war *or* during the existence of any national emergency proclaimed by the President; and there is a condition subsequent in order to make such "restrictions and prohibitions" effective: that these "restrictions and prohibitions be publicly proclaimed." The Act also provides that such "restrictions and prohibitions" shall be effective "until otherwise ordered by the President or the Congress."

[fol. 30] On December 16, 1950, President Truman proclaimed the existence of a national emergency (64 Stat. A454, Proclamation No. 2914); this is the condition precedent to the President imposing "restrictions and prohibitions" on travel.

On January 17, 1953, President Truman executed Proclamation No. 3004 for the Control of Persons Leaving Or Entering The United States in which he specifically found:

that the existence of the national emergency which he proclaimed (No. 2914) on December 16, 1950 were still in existence; and that the exigencies of the international situation and of the national defense require the imposition of restrictions and prohibitions upon travel in addition to those otherwise provided by law. (67 Stat. C31, 18 Fed. Reg. 489).

In pertinent part, Proclamation No. 3004 provides:

"• • • I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of Title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations and orders with respect thereto:

"1. The departure and entry of citizens and nationals of the United States from and into the United States including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and pub- [fol. 31] lished as sections 53.1 to 53.9, inclusive, of Title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require. • • •"

Title 22, Code of Federal Regulations, Part 53, Travel Control of Citizens and Nationals In Time of War or National Emergency comprise the regulations applicable to this case.

On January 19, 1961, 22 C.F.R. 53.3(b) was amended to exclude Cuba from the list of places that one may travel to without a passport; or to put it another way, the effect of this amendment is to require a valid passport issued by the Secretary of State in order to travel to Cuba (unless the individual falls within an exception enumerated in 53.3 which is not applicable here).

On April 5, 1958, §53.8 was reinstated, and it provides:

> "§53.8 Discretional exercise of authority in passport matters. Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries."

Defendant was indicted on June 26, 1963 in two counts charging her with departing from the United States to Cuba without bearing a valid passport on January 22, 1962 and on August 18, 1962.

[fol. 32]

II

Summary of Argument

Defendant urges this Court to dismiss the indictment because:

1. There is no legislative authority for prohibiting travel to Cuba;

2. The statute and regulations are an unlawful delegation of legislative power;

3. The statute is void for vagueness;

4. There is no national emergency still in existence today;

5. The statute and the regulations deprive defendant of her constitutional right to travel.

The plaintiff shall and does rely on *Worthy* v. *Herter*, 270 F.2d 905 (D.C. Cir. 1959), cert. den. 361 U.S. 918, as being dispositive of defendant's motion to dismiss.

III

There Is Legislative Authority for the Prohibition of Travel to Cuba.

Congress authorized the President to impose restrictions and prohibitions on travel under certain conditions. The conditions were met. The President imposed the restrictions and prohibitions.

Defendant argues that there is nothing on the face of the statute authorizing geographic restrictions on travel. Plaintiff points out that the statute authorizes restrictions and prohibitions on travel, without defining the kind of prohibition or restriction; and suggests that the most natural restriction or prohibition of travel is one based upon geography.

Worthy v. *Herter, supra,* is a complete answer to this proposition.

Porter v. *Herter,* 278 F.2d 280 (D.C. Cir. 1960) held that the geographical limitations imposed upon a Congressman's passport were valid.

[fol. 33] See also *Frank* v. *Herter,* 269 F.2d 245 (D.C. Cir. 1959), cert. denied 361 U.S. 918.

IV

The Statute (8 U.S.C. 1185(b)) Is Not an Unlawful Delegation of Legislative Power

The gist of defendant's argument on this point is the lack of any standards whatsoever for the exercise of the power to restrict or prohibit travel delegated by Congress to the President.

The only ascertainable standard in the statute is that if "the President shall find that the interests of the United States require" additional restrictions and prohibitions on travel; then he may impose them.

Defendant relies on *Schechter* v. *United States*, 295 U.S. 495 (1935) which dealt with the National Industrial Recovery Act's delegation to the President to approve of "codes of fair competition" in interstate commerce; and *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), which dealt with the National Industrial Recovery Act's delegation to the President to regulate interstate and foreign commerce of petroleum.

The present statute deals with foreign affairs, and the law is clear that the President's conduct of the foreign affairs of our nation is not reviewable by the judiciary.

Judge Prettyman, in *Worthy* v. *Herter, supra*, page 913 said:

> "Judgment on what course of action will best promote our foreign relations has been entrusted to the President, not to the courts, journalists, scholars, or even 'public opinion.' He makes his decision with the aid of the Department of State, a large organization with stations throughout the world, as well as on the basis of information received from all other parts of [fol. 34] the Executive Branch. We, if we had all this information, might reach a different decision. But the Constitution has wisely placed that burden in the hands of one who must justify his decisions before the Electorate."

There are excellent practical reasons for the Constitutional separation of powers in regard to the Chief Executive's control over the conduct of international affairs. As stated by Justice Jackson in *Chicago and Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948):

> "But even if courts could require full disclosure [of confidential executive material], the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the Government, Executive and Legislative. They are delicate,

complex, and involve large elements of prophesy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong to the domain of political power not subject to judicial intrusion or inquiry. Coleman v. Miller, 307 U.S. 433, 454; United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-321; Oetjen v. Central Leather Co., 246 U.S. 297, 302."

In accord with the classic rule that the courts will not interfere in the conduct of international relations by the Chief Executive are *Z. & F. Assets Realization Corp.*, v. *Hull,* 144 F.2d 464, 469 (D.C. Cir. 1940), aff'd 311 U.S. 470 (1941), and *Rocha* v. *United States,* 288 F.2d 545, 549 (9 Cir. 1961) cert. den. 366 U.S. 948 (1961).

[fol. 35] In 1936, the year after the *Schechter* and *Panama Refining* cases, the Supreme Court was again called upon to strike down legislation as being an unlawful delegation of legislative power to the President, but this time the legislation dealt not with internal affairs of the nation, but with foreign affairs, and the Court in holding that there was no unconstitutional delegation of legislative power to the Executive, said:

"Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it....

"It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment [fol. 36] —perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. . . .

"When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. . . ." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-321 (1936).

It is also noteworthy that the legislation being considered in this case authorized the President to impose restrictions and prohibitions on a geographical basis. The decision also

reviews many other enactments of a similar nature that validly support the plaintiff's position.

[fol. 37]

V

The Statute and the Regulations Are Not Void for Vagueness.

In *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951), the Supreme Court said at page 230:

> "The essential purpose of the 'void for vagueness doctrine' is to warn individuals of the criminal consequences of their conduct. *Williams* v. *United States*, 341 U.S. 97, . . . *Screws* v. *United States*, 325 U.S. 91, 103-104 (1945)."

We submit that 8 U.S.C. 1185(b) is a lucid warning of the fact that if a citizen of the United States departs from the United States without bearing a valid passport then criminal consequences may ensue.

VI

The National Emergency Declared by the President Is Still in Existence.

Defendant's argument on this point is bottomed on the proposition that the declaration of national emergency operative herein (No. 2914 as recognized in No. 3004) was based solely upon the war powers; and this is not true.

In the proclamation of national emergency, No. 2914, President Truman premised his declaration not only on "recent events in Korea and elsewhere", but also on the threat of "world conquest by communist imperialism", and "the increasing menace of the forces of communist aggression."

We note also that 8 U.S.C. 1185 provides, "When the United States is at war or during the existence of any national emergency proclaimed by the President" which is an obvious indication of Congressional recognition of national emergencies other than war.

[fol. 38] In *Worthy* v. *Herter, supra,* pages 910-911, Judge Prettyman in recognizing the foreign relations power as a basis for the national emergency, said:

> "We think the designation of certain areas of the world as forbidden to American travelers falls within the power to conduct foreign affairs. The bare determination that certain areas outside this hemisphere are trouble spots, or danger zones, is a phase of 'foreign affairs'. Such a determination involves information gleaned through diplomatic sources and channels, and a judgment premised in large part upon foreign policy. The grounds upon which the President would make such a designation are foreign considerations, foreign affairs and policy. Indeed it would seem that such a restriction is in and of itself a foreign policy. It is at least an instrument of foreign policy. . . .
>
> ". . . The essence of the conduct of foreign affairs is the maintenance of peace, the prevention of war. The Constitution places that task of prevention in the hands of the Executive. The two correlative powers, to conduct war and to prevent war, are Executive functions under our Constitution. . . .
>
> "We think that, if the Executive foresees that the presence of American citizens in a designated foreign area may, by reason of military or political conditions there, evolve into, or be the occasion of, a clash, diplomatic or military, with a foreign government, his power in respect to foreign affairs includes power to refuse to sanction the travel of American citizens in that area. To hold the contrary would be to hold that the protec-
> [fol. 39] tion of the peace against American-caused incidents in foreign countries is outside the realm of foreign affairs. Such latter holding would be both illogical and unrealistic. . . ."

It is also noteworthy that the statute (8 U.S.C. 1185) reserved to Congress the power to declare that the additional

"restrictions and prohibitions" imposed by the President are now null and void where it provides that it shall be unlawful to engage in such prohibited conduct "until otherwise ordered by the President or the Congress."

Defendant asks this court to declare the presidential proclamations ineffective at this time. Has the court the power to do so? What is the scope of judicial review over the President's constitutional power to conduct the foreign affairs of the nation?

Judge Prettyman in *Worthy* v. *Herter, supra,* page 911, reviewed the authorities and then said:

> "It is settled that in respect to foreign affairs the President has the power of action and the courts will not attempt to review the merits of what he does. The President is the nation's organ in and for foreign affairs."

The continued existence and recognition of this same national emergency has been noted by Congress and by Presidents Eisenhower and Kennedy.

In March of 1958, the House Judiciary Committee, interested in "Provisions of Federal Law presently in effect by reason of the national emergency proclaimed by the President December 16, 1950", reported on the provisions of law "in effect by reason of this national emergency," and in the "Foreword", Chairman Emanuel Celler explained that:

> "the change in the international position of the United States since the end of World War II, the cold war, [fol. 40] the Korean episode, have all made it necessary to continue in force many of these temporary statutes. It is largely for that reason that today, almost 5 years after the signing of the Korean armistice, the national emergency proclaimed to meet that situation is still in effect".

On November 29, 1960, President Eisenhower issued Executive Order No. 10896 (3 C.F.R. (1960 Supp.) 89) in

which he proclaimed, "the continued existence of the national emergency proclaimed by Proclamation No. 2914." See also Executive Order 10995 (3 C.F.R. (1961 Supp.) 74).

On January 25, 1962, the House Judiciary Committee issued a new committee report on the "Provisions of Federal Law in effect in time of national emergency," and Chairman Celler in the "Foreword" said:

> "The emergency proclaimed by the President in 1950 had not yet been terminated and the chronic state of international tensions made it clear that it would not be terminated in the foreseeable future."

On July 24, 1962, President Kennedy issued Executive Order No. 11037 in which he noted, "the continued existence of the national emergency proclaimed by Proclamation 2914 of December 16, 1950." (3 C.F.R. (1962 Supp.) 230).

VII

The Statute and the Regulations Do Not Unconstitutionally Deprive Defendant of Her Right to Travel

This point is completely refuted in the lucid opinion of Judge Prettyman in *Worthy* v. *Herter, supra.*

[fol. 41]

VIII

Conclusion

Defendant's Motion to Dismiss the Indictment should be denied.

Respectfully submitted,

Francis C. Whelan, United States Attorney;

Thomas R. Sheridan, Assistant United States Attorney, Chief, Criminal Section, Attorneys for Plaintiff United States of America.

[fol. 42] Certificate of Service by Mail (omitted in printing).

[fol. 43]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MINUTE ENTRY SETTING MOTION TO DISMISS FOR HEARING —October 14, 1963

Attorney Finkel appears for attorney McTernan and moves for continuance and states grounds therefor. Court grants said motion and orders hearing of defendant's motion to dismiss continued to October 21, 1963 at 11 A.M.

[File endorsement omitted]

[fol. 44]

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

DEFENDANT'S REPLY TO OPPOSITION TO DEFENDANT'S MOTION TO DISMISS—Filed October 18, 1963

We respond *seriatim* to the points covered by the Government in its opposition. These points related in their subject matter and order to those urged by defendant in support of her motion.

1. ***Whether there is legislative authority for the prohibition upon travel to Cuba.***

The Government concedes (p. 5, lines 22-24) that the statute does not define "the kind of prohibition or restric-

[File endorsement omitted]

tion" on travel which it authorizes. While in the context of this case it might seem to the Government counsel in this case that "the most natural restriction or prohibition" is one "based on geography" (p. 5, lines 25, 26), it might as easily be thought to be natural to base the limitation on the traveler's politics (cf. *Kent* v. *Dulles*, 357 U.S. 116, 2 L.ed.2d 1204) or his involvement in wartime espionage or his being a fugitive or his acting in the interests of a [fol. 45] government with which we are at war. (See, e.g., Report on 1941 predecessor statute, S. Rep't No. 44, 77th Cong., 1st Sess., pp. 1, 2; 87 Cong. Rec. 5048-5053, 5386-5388; see also Report on 1918 predecessor statute, H.R. Rep't No. 485, 65 Cong., 2d Sess., pp. 2, 3.) Plainly the statute is ambiguous as to what kinds of restrictions and prohibitions it empowers the executive to impose. Since the statute trenches upon a particularly sensitive First Amendment right, the rule of strict construction applies. *Kent* v. *Dulles*, 357 U.S. at 129, 2 L.ed.2d at 1212. Invoked in a criminal proceeding, the rule of strict construction applies for a second independent and reinforcing reason. See, e.g., *Winters* v. *New York*, 333 U.S. 507, 92 L.ed. 840 (1948).

In *Kent* v. *Dulles*, *supra*, the Supreme Court refused to construe this statute so as to find a power to abridge the freedom to travel for reasons of the individual's ideology. This, because of the "large social values" that inhere in freedom of movement. (357 U.S. at 126, 2 L.ed.2d at 1210.) Here freedom of movement is to be abridged for reasons of geography, and the thrust is directly upon what the individual desires to see and hear, his opportunity to learn from more than official "news" handouts about countries which have a radically different approach to the same problems we have, poverty, hunger, disease, ignorance. The rule of strict construction no more permits this abridgement than the one attempted in *Kent*, *supra*.

Moreover, the Government has failed to answer our argument on the legislative history. Here a concededly

vague statute was enacted in a context of antecedent legislation that had been used to restrict travel only for reasons of "citizenship or allegiance on the one hand or . . . criminal or unlawful conduct on the other." (*Kent* v. *Dulles*, 357 U.S. at 128, 2 L.ed.2d at 1211.) The present statute, in terms virtually identical with its predecessors, was enacted without Congressional indication of intent to [fol. 46] enlarge or change the scope or objectives of the executive's power. The earlier statutes having been confined to the purposes just indicated, there is every reason to conclude that the present statute was similarly intended to be so limited. This reading of 8 USC 1185(b) seems to have been finally determined in *Kent* where the Court said that the reasons for restriction applied under the earlier statutes "are the only ones which it could fairly be argued were adopted." (357 U.S. at 128, 2 L.ed.2d at 1211.)

2. *Whether the statute delegates legislative powers.*

The Government's position here is that the executive's conduct in proscribing travel to Cuba is in the area of foreign affairs and is "not reviewable by the judiciary." (p. 6, lines 20-22.) The very authorities cited by the Government show that the rule is that executive actions that rest upon a "political" judgment are beyond judicial review because their basis is outside the competence of the judicial process. This point is explicitly and fully stated in the majority[1] opinion in *Chicago & S. Air Lines* v. *Waterman SS Corp.*, 333 U.S. 103, 92 L.ed. 568 (1948). The language is quoted by the Government. (p. 7, lines 9-27.) It was even more comprehensively stated in *Coleman* v. *Miller*, 307 U.S. 433, 83 L.ed. 1385, where the Court was confronted with the question whether the child labor amendment had been ratified by the requisite number of States within a "reasonable time" of its proposal by the Congress.

[1] The case was decided 5 to 4. Of the tribunal as then constituted only two of the dissenters are in today's Court.

The Court refused to pass on this question because it was political and beyond the judicial competence:

"Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute. In their endeavor to answer this question [fol. 47] petitioners' counsel have suggested that at least two years should be allowed; that six years would not seem to be unreasonably long; that seven years had been used by the Congress as a reasonable period; that one year, six months and thirteen days was the average time used in passing upon amendments which have been ratified since the first ten amendments; that three years, six months and twenty-five days has been the longest time used in ratifying. To this list of variables, counsel add that 'the nature and extent of publicity and the activity of the public and of the legislatures of the several States in relation to any particular proposal should be taken into consideration.' That statement is pertinent, but there are additional matters to be examined and weighed. When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elapsed since its submission, to consider the economic conditions prevailing in the country, whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it or whether conditions were such as to intensify the feeling of need and the appropriateness of the proposed remedial action. In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of decid-

ing a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The ques- [fol. 48] tions "they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment." (307 U.S. at 453-453; 83 L.ed. at 1396.)

But here we deal with no political decision in the sense of these cases. As in *Kent* v. *Dulles*, we deal with the First Amendment right to travel and with freedom of exit, a "liberty" embraced within the Fifth Amendment's protection. Here the executive has no "unbridled discretion." "[T]here is more involved here" than "political questions entrusted to the Chief Executive by the Constitution." (*Kent* v. *Dulles*, 357 U.S. at 129, 2 L.ed.2d 1212.) To regulate the liberty involved here the executive must act "pursuant to the law-making functions of the Congress." And if the latter delegates power to the executive "the standards must be adequate to pass scrutiny by the accepted tests. See Panama Ref. Co. v. Ryan, 293 U.S. 388, 420-430, 79 L.ed. 446, 458-464. . . ." (Idem) Moreover, any delegated powers that curtail or dilute this liberty "we will construe narrowly." (Idem.)

This concept is not new. In *Perez* v. *Brownell*, 356 U.S. 44, 2 L.ed. 2d 603 (1959), the statute under review provided for the automatic denaturalization of citizens on the basis of their conduct in foreign countries. The statute was held to be an exercise by the federal government of its power to regulate foreign affairs. This power was there said to be an inherent power of sovereignty not resting upon a specific delegation in the Constitution. Nevertheless such power was held to be subject to the same restrictions, judicially interpreted and applied, as the exercise of the

expressly delegated power. (356 U.S. at 57, 58; 2 L.ed.2d at 613.) In *United States* v. *Curtiss-Wright Export Corp.*, 290 U.S. 304, 81 L.ed. 255 (1936), the inherent sovereign power of both Congress and the President in matters of [fol. 49] foreign affairs were held to be subordinate to the "applicable provisions of the Constitution." (290 U.S. at 320, 81 L.ed. at 262.) There a delegation of power to the President in foreign affairs matters was involved. In the final analysis the Court did find a statutory standard guiding the President's action and upheld the statute and the Presidential action thereunder. (290 U.S. at 329, 81 L.ed. at 262.)

The Government's argument proves too much. For if all executive action in "foreign affairs" were free of judicial review and all delegation of power in this field relieved of the requirement for standards guiding his action, we would have the very "unbridled discretion" which the Supreme Court refused to tolerate in *Kent* v. *Dulles, supra.* Upon such a doctrine as the Government here advances, citizens could be subjected to arbitrary controls and disabilities imposed by executive fiat, undertaken on executive initiative alone, and answerable to no authority. There is of course a large area of "foreign affairs" where the executive is made answerable only to the electorate. It includes making various forms of international agreements, compacts and conventions (see *United States* v. *Belmont,* 301 U.S. 324, 330, 331), recognizing foreign governments (see *Oetjen* v. *Central Leather Co.,* 246 U.S. 297; *United States* v. *Belmont,* supra), conducting embargoes and similar activities short of actual hostilities (see *United States* v. *Curtiss-Wright Export Corp.,* 290 U.S. at 322-325). But the law is plain, we submit, that this "unbridled" power does not extend to depriving citizens of First and Fifth Amendment liberties. These reach too intimately into the very structure and functioning of a free society.

If the decision in *Worthy* v. *Herter,* 270 F.2d 905 (CA, DC, 1959) holds to the contrary, we respectfully submit

that it is erroneous. It may be that *Worthy* can be distinguished from the case at bar because there an applicant was denied a passport, while here a citizen is criminally prosecuted for having traveled without one. If, as is usual [fol. 50] in criminal cases, stricter standards of statutory or executive proscription and narrower construction of statutory and regulatory language are required, it is possible to say that the denial of passport in *Worthy* could stand side by side with dismissal of the prosecution here. But the main thrust of the *Worthy* opinion is that the executive had an inherent as well as a legislative power to mark areas of the world off limits as part of the power to regulate foreign affairs, and that this power is subject to no legal or constitutional restriction judicially imposed. While there can be no question that the issuance of passports to American citizens and their travel abroad raises questions of "foreign affairs," this is but the beginning, not the end of the problem. To the extent that governmental action impinges upon citizens' rights, it is subject to constitutional limitation and judicial review. Whatever may have been the effect of the denial of passport in *Worthy*, there can be no question here but that the executive proscription and its purported statutory authorization, directly and ineluctably affect the citizen's liberty. To this extent, at least, the courts have the power and the duty to examine the action and to measure it by legal and constitutional standards. As was observed in *Kent, supra*, this presents no "political" questions. The court is not asked here to review the basis upon which the executive determined that our citizens might not look inside Cuba. Rather is the court called upon to examine whether this statute properly confers such powers. We do not deal here even with what was asserted in *Worthy* to have been inherent powers of the President. The prosecution here asserts no such powers; the indictment defines an offense under a statute. That statute, as interpreted and applied to this defendant, presents a judicial not a political question.

That question must be determined by legal and constitutional standards.

[fol. 51] 3. *Whether the statute and regulations are void for vagueness.*

We make no answer to the Government's brief argument for it does not meet the contentions we have urged.

4. *Whether the national emergency declared by the President is still in existence.*

We do not seek here to review the facts upon which the Presidential Proclamations of national emergency rest. For it is not claimed here that the proclamations were invalid or baseless when issued. As we understand the cases cited in our original memorandum, it is open in a judicial proceeding, where the effectiveness of the law depends upon facts found some period in advance of the prosecution, to show that the facts so found no longer exist. In effect, what we ask for here is a hearing as to whether or not there is in reality a threat of world conquest by communist imperialism or such increasing menace of the forces of communist aggression as to justify the destruction of the all-important First Amendment liberties so essential to the preservation of a free society.

Respectfully submitted,

Margolis and McTernan, by John T. McTernan, Attorneys for Defendant.

A. L. Wirin, Legal Department, American Civil Liberties Union, Of Counsel.

[fol. 52] Proof of Service by Mail (omitted in printing).

[fol. 53]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MINUTE ENTRY CONTINUING HEARING ON MOTION TO DISMISS—October 21, 1963

Defendant is present with counsel. Counsel present as shown and due to lateness of the hour and the United States Attorney being detained in another court, Court orders matter continued to October 28, 1963, 10:30 A.M.

[File endorsement omitted]

[fol. 54]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MINUTE ENTRY OF HEARING MOTION TO DISMISS—October 28, 1963

Defendant is present with counsel. Filed designation of counsel and appearance praecipe of A. L. Wirin for defendant.

Attorney McTernan makes argument from 10:30 A.M. to 10:55 A.M.

Counsel for government makes argument from 10:55 A.M. to 11:02 A.M.

[File endorsement omitted]

Attorney A. L. Wirin (co-counsel) makes argument from 11:02 A.M. to 11:36 A.M.

Counsel for government makes reply argument from 11:36 A.M. to 11:40 A.M.

Court orders defendant's motion to dismiss to "stand submitted."

Counsel estimate case to take 2 days to try by jury.

Court orders 2-day jury trial set for February 25, 1964 at 10:00 A.M. if the motion be denied, if the motion granted, trial date will become "moot".

[fol. 55]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff,

vs.

HELEN MAXINE LEVI TRAVIS, Defendant.

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS—October 30, 1963

Defendant moves for dismissal of two-count Indictment charging defendant with unlawful departure from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico, in violation of Section 1185(b), Title 8, U.S.C., as more particularly set forth in the Indictment. Defendant urges (1) that there is no legislative authority for prohibiting or regulating travel to

[File endorsement omitted]

Cuba or in any way limiting travel on a geographical basis, (2) that the statute delegates legislative power contrary to Article I, Section 8, of the Constitution of the United States, and (3) that the statute is vague, contrary to the First and Fifth amendments to the Constitution and deprives the defendant of liberty without due process of law. Counsel for the parties have filed points and authorities and argued the matter at length. It is not controverted that by proclamation No. 2914, issued December 16, 1950, President Truman proclaimed the existence of a national [fol. 56] emergency by reason of facts therein stated. Such an emergency is a condition precedent to the President imposing "restrictions and prohibitions" on travel. (8 U.S.C. § 1185)

On January 17, 1953, after the adoption of the statute codified as 8 U.S.C. § 1185, in June, 1952, President Truman executed Proclamation No. 3004 for control of persons entering or leaving the United States in which he found, among other things, the said national emergency still existed and that the interests of the United States required restrictions and prohibitions, in addition to those otherwise provided by law. In January, 1961, the Code of Federal Regulations (22 C.F.R. 53.3b) was amended to exclude Cuba from the list of places that one might travel to without a passport.

The continued existence of the national emergency, proclaimed in December, 1950, has been observed on several occasions, the latest being President Kennedy's Executive Order No. 11037 of July 20, 1962.

As defendant points out, one of the conditions of Section 1185, supra, in addition to the proclaimed emergency, is that there must be a finding by the President that the interests of the United States require restrictions and prohibitions upon departure and entry of persons from and into the United States unless he has a valid passport, before the provisions of Section 1185(b) may be implemented. It appears to the court that the proclamation of a national

emergency of December, 1950, satisfied the conditions of Section 1185 although said proclamation antedated the effective date of the statute (June, 1962), and that the findings of President Truman in his Proclamation No. 3004 of January, 1953 re the interests of the United States requiring restrictions and prohibitions as set forth therein met the requirements of the statute and that the restric-
[fol. 57] tions on travel as imposed by the Regulations amended in 1961 to require a United States passport in order to travel to Cuba are valid unless in violation of the provisions of the Constitution.

Defendant strongly relies on the case of *Kent* vs. *Dulles*, 357 U.S. 116, which holds that if a citizen's liberty to travel is to be regulated it must be pursuant to the law making functions of Congress, any delegation of the power must be subject to adequate standards, and such delegated authority will be narrowly construed (See page 129 of the Opinion). However, the court observes in the Kent case, at page 129:

> "Thus we do not reach the question of constitutionality. We only conclude that § 1185 and § 211a do not delegate to the Secretary the kind of authority exercised here."

The court in the Kent case was dealing with beliefs, associations and ideological matters. At page 130, the court observes that it would be faced with important constitutional questions were it to hold that Congress by § 1185 had given the Secretary authority to withhold passports to citizens *because of their beliefs or associations* and that the Secretary "may not employ *that standard* to restrict the citizens' right of free movement." (Emphasis ours.)

Kent vs. Dulles, supra, was discussed in the recent case of *Worthy* vs. *Herter*, 270 F. 2d 905 (D.C. Cir., May 18, 1959), Certiorari denied Oct. 12, 1959. At page 907 of its opinion, the court states:

"We note immediately that the point here presented in no wise resembles the matter decided by the Supreme Court in Kent vs. Dulles.[1] There the Court held that the Secretary refused passports because of the [fol. 58] beliefs and associations of the applicants and that he had no statutory authority to refuse on such grounds."

The Worthy case involved the right of the defendant, a newspaper reporter, to renewal of a passport without restrictions on travel to China and certain other countries with which the United States did not have diplomatic relations. Worthy refused to agree to abide by the restrictions and the renewal of the passport was refused. The court observed that the refusal rested in no part upon Worthy's personal beliefs, writings or character, going on to say, at page 907:

"It was an application of the Secretary of State's general policy of refusing Government sanction to travel by United States citizens in certain areas of the world, presently under Communist control and deemed by him to be trouble spots."

Defendant herein argues that there is no legislative authority to prohibit travel to Cuba or limit travel on a geographical basis, that the statute in authorizing the Executive Department to prohibit travel to Cuba, unconstitutionally delegates legislative power. As observed by the court in the Worthy case, it appears to this court that the President has under his Constitutional powers ample authority to conduct foreign affairs and to conduct and prevent war and, incident thereto, the power to limit travel to Cuba through regulations issued by the State Department. The conducting of foreign affairs would certainly include the authority to limit travel to certain areas of the world by citizens of this country without valid passports.

Whether the national emergency proclaimed in 1950, which Proclamation (No. 2914) was premised, among other [fol. 59] things, on the threat of "world conquest of Communist imperialism" and "the increasing menace of the forces of Communist aggression", has terminated, is not for judicial determination. Neither is the question of whether conditions in Cuba or other reasons involving the conducting of foreign affairs are sufficient to require the limiting of travel to that country.

Professor Commager's article re "Americans Should Have Freedom to Travel", appearing in the New York Times on October 21, 1963, cited by defendant, is thought provoking and Professor Commager eloquently and persuasively states the case for freedom of travel. However, Congress has determined, no doubt after long consideration and study of the problems involved and with access to many facts and opinions of experts in the field, to which Professor Commager did not have access, that under given circumstances it shall "be unlawful for citizens to depart from or enter or attempt to depart from or enter, the United States unless he bears a valid passport." (§ 1185b, supra.)

It appears to the court that political or military conditions and questions are involved herein and, as pointed out above, we are not here concerned with the same question as confronted the court in the Kent case, supra. Neither does it appear that a narrow construction of the delegated powers precludes the instant limitation. The President delegated to the Secretary of State authority for the present limitation by the terms of Proclamation No. 3004. The limitation does not determine which Americans may receive passports but succinctly eliminates Cuba as a country which may be visited without a valid passport therefor. There are certain exceptions to the regulation which are not pertinent to the case at bar.

[fol. 60] If the Constitutional authority of the President is not sufficient to authorize the limitation on travel to

Cuba then the statute as set forth in § 1185, Title 8, U.S.C., clearly provides the necessary authority. What action will best promote our foreign relations is not for the courts to determine, but the President, who operates in that field through the State Department.

The Worthy case is on the civil side and denial of the renewal of a passport was involved while in the case at bar the defendant is criminally prosecuted for having traveled without a passport but the principles and questions here involved are considered and treated in the Worthy case, and the conclusions of that court may be properly applied to the circumstances herein.

It is true that travel to foreign countries has been and is encouraged by the President and rightfully so. To know a people is to better understand them but such travel may be limited by conditions, which in the pursuance of our foreign affairs or in preventing war are found to be prejudicial to our country's best interests, and such determinations are not subject to judicial review but are properly within the province of the duly elected representatives of the citizens of this country. Though right to travel is a part of the "liberty" of which a citizen cannot be deprived without due process of law under the Fifth Amendment, this court concludes that the limitation here involved is invoked with due process of law and the court concludes, as did the court in the Worthy case, supra, that the right to travel, like every other form of liberty, is, in its concept of an ordered society, subject to restrictions under some circumstances and for some reasons.

For the foregoing reasons the defendant's motion to [fol. 61] dismiss is hereby denied.

Dated: October 30, 1963.

E. Avery Crary, United States District Judge.

[fol. 62]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

WAIVER OF TRIAL BY JURY AND WAIVER OF SPECIAL FINDINGS OF FACT [RULE 23(A) AND (C) FED.R.CRIM.P.]—Filed April 7, 1964

The undersigned defendant hereby waives the right to a trial by jury and requests the court to try all charges against him in this case without a jury.

The undersigned defendant further waives the right to request any special findings of fact as provided by Rule 23(c) of the Federal Rules of Criminal Procedure.

April 6, 1964.

Helen L. Travis, Defendant.

The undersigned attorney and counsellor-at-law represents that prior to the signing of the foregoing waiver, the defendant above named was fully advised as to the rights of an accused under the Constitution and laws to a speedy and public trial by jury, and the right to request special findings in a case tried without a jury; and further represents that, in his opinion, the above waiver by the defendant of trial by jury and special findings is voluntarily and understandingly made, and recommends to the court that the waiver be approved.

April 6, 1964.

John T. McTernan, Attorney for Defendant.

The United States Attorney hereby consents that the case be tried without a jury, and waives the right to request any special findings of fact as provided by Rule 23(c) of the Federal Rules of Criminal Procedure.

March 16, 1964.

United States Attorney, By Thomas R. Sheridan, Assistant United States Attorney.

Approved April 6, 1964.

E. Avery Crary, United States District Judge.

[File endorsement omitted]

[fol. 63]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

STIPULATION OF FACTS—Filed April 7, 1964

1. It Is Hereby Stipulated by plaintiff, United States of America, by and through counsel, Francis C. Whelan, United States Attorney, and Thomas R. Sheridan, Assistant United States Attorney, for the Southern District of California, and Helen Maxine Levi Travis and her counsel, John T. McTernan and A. L. Wirin, that jury trial is waived (a written waiver of jury trial is also on file) and the Court may decide the case on the following stipulated facts and argument of counsel.

2. That at all times mentioned in both counts of the indictment No. 32380-CD the defendant, Helen Maxine Levi Travis, was and is a citizen of the United States of America, and her residence address was and is 6324 Primrose Avenue, Los Angeles, California.

[File endorsement omitted]

3. That on January 21, 1962, defendant, Helen Maxine Levi Travis, at Los Angeles International Airport, Los Angeles, California, applied for and was issued a United [fol. 64] Mexican States tourist permit number 3677106 through Pan American Airways, allowing her to enter the Republic of Mexico within the next 45 days and remain therein 180 days from the date of entry as a "tourist."

4. That on January 22, 1962, defendant, Helen Maxine Levi Travis, intentionally left and departed from the United States of America by boarding flight number 901 of the Compania Mexicana De Aviacion at the Los Angeles Airport, Los Angeles, California, and was a tourist passenger on said flight to Mexico, D. F., and at the time of boarding said flight at Los Angeles, California, intended to seek permission from representatives of the Republic of Cuba in Mexico, D. F., to visit Cuba, and if such permission was granted, to travel from Mexico, D. F., to Cuba. At the time of departing from the United States as herein stated, defendant, Helen Maxine Levi Travis, did not have Cuba's permission to enter Cuba. On January 23, 1962, in Mexico, D. F., defendant, Helen Maxine Levi Travis, applied for permission to enter Cuba, and said permission was granted on January 26, 1962.

5. That on February 1, 1962, defendant, Helen Maxine Levi Travis, intentionally left and departed from the Central Airport, Mexico, D. F., by boarding flight number 311 of the Compania Mexicana De Aviacion, and was a tourist passenger on said flight to Havana, Cuba.

6. That prior to boarding said flight number 311 at Central Airport, Mexico, D. F., United Mexican States tourist permit number 3677106 was cancelled by an official of the Department of Interior, United Mexican States, at Mexico, D. F.

7. That on August 18, 1962, defendant, Helen Maxine Levi Travis, intentionally left and departed from the United States of America, by automobile at San Ysidro,

California, and entered the Republic of Mexico, at Tijuana, Baja California, and at the time she departed from the United States of America she intended to seek permission from representatives of the Republic of Cuba in Mexico, [fol. 65] D. F., to visit Cuba, and if such permission was granted, to travel from Mexico, D. F., to Cuba. At the time of departing from the United States as herein stated, defendant, Helen Maxine Levi Travis, did not have Cuba's permission to enter Cuba. On August 23, 1962, in Mexico, D. F., defendant, Helen Maxine Levi Travis, applied for permission to enter Cuba, and said permission was granted on August 30, 1962.

8. That on August 18, 1962, defendant, Helen Maxine Levi Travis, applied for and was issued a United Mexican States "tourist" permit number 2997335 at the Office of Migration, Department of the Interior, Tijuana, B. C., allowing her to enter the Republic of Mexico and remain there for 180 days from date of entry.

9. That on August 31, 1962, United Mexican States tourist permit number 2997335 was cancelled by an official of the Department of Interior, United Mexican States, at Mexico, D. F.

10. That on August 31, 1962, defendant, Helen Maxine Levi Travis, intentionally left and departed from the Central Airport, Mexico, D. F., by boarding flight number 465 of the Compania Cubana De Aviacion and was a tourist passenger on said flight to Havana, Cuba.

11. At no time pertinent or material herein did defendant, Helen Maxine Levi Travis, bear a valid United States passport specifically endorsed for travel to the Republic of Cuba; she at all times pertinent and material herein knew the provisions of Section 1185(b) of Title 8, United States Code, and Sections 53.2 and 53.3 of Title 22, Code of Federal Regulations.

12. That the defendant, Helen Maxine Levi Travis, on each occasion of her travel to Havana, Cuba, did travel in

and about the Republic of Cuba and observe therein the living and working conditions of the people and the effectuation and implementation of various government programs relating to housing, education, agriculture, industrialization and public health. In the course of said travel and [fol. 66] observation the said defendant took a number of photographs and those photographs attached hereto (as Exs. 1A to 1M) are representative of those taken by her as aforesaid.

13. That after the return of the defendant, Helen Maxine Levi Travis, from the departures set out in paragraphs 3, 4, 5 and 6 and paragraphs 7, 8, 9 and 10 and to her home in Los Angeles, California, she appeared before various groups and gatherings of her fellow citizens and reported to them her observations and findings during her trips to Cuba as aforesaid, and showed her photographs taken there, including Exs. 1A to 1M. In addition, the said defendant wrote descriptions of her trips and her observations in Cuba which she disseminated by mail to friends and acquaintances, and the copy of her letter dated February 28, 1962, attached hereto (as Ex. 2) is representative of the information she communicated to them.

Dated: This 2nd day of April, 1964.

Francis C. Whelan, United States Attorney;

Thomas R. Sheridan, Assistant United States Attorney, Chief, Criminal Section, Attorneys for Plaintiff, United States of America.

John T. McTernan, Margolis and McTernan, Attorneys for Defendant, Helen Maxine Levi Travis;

A. L. Wirin, Co-Counsel for Defendant.

Helen Maxine Levi Travis, Defendant.

[fol. 67]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MINUTE ENTRIES OF WAIVER OF JURY TRIAL, ETC.—
April 7, 1964

PROCEEDINGS: JURY TRIAL:

The defendant is present with counsel. Filed waiver of trial by jury.

Court trial proceedings. Filed stipulation of facts. Filed defendant's contentions.

Plaintiff's exhibits 1-A through 1-M inclusive are marked and admitted in evidence, and plaintiff's exhibit 2 is marked and admitted in evidence pursuant to stipulation. Both sides rest and oral argument continued to 1:30 P.M. today.

Court reconvenes at 1:33 P.M., defendant present with counsel. Counsel for defendant moves for judgment of acquittal and court hears argument by Attorney McTernan from 1:33 P.M. to 2:23 P.M. Attorney Wirin makes argument from 2:13 P.M. to 2:57 P.M. Court recesses at 2:58 P.M.

Court reconvenes at 3:16 P.M., defendant present with counsel. Attorney Sheridan makes argument from 3:12 P.M. to 3:31 P.M. Court permits defendants to file additional memorandum of points and authorities in 10 days and plaintiff 19 days thereafter to file answering brief and defendant 5 days to file reply brief, if necessary, and the matter to stand submitted upon final filing of briefs.

Court adjourns at 3:32 P.M.

John A. Childress, Clerk, By Wayne E. Payne, Deputy Clerk.

EC 4/7/64

[File endorsement omitted]

[fol. 68]

UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL—Filed April 17, 1964

This memorandum is submitted pursuant to leave of court following oral argument on defendant's motion for judgment of acquittal. The evidence is set forth in the Stipulation of Fact made and entered into by counsel for the parties with the express participation of the defendant personally. Because of the brevity of the Stipulation, there is no need to summarize the evidence here.

I. *The Defendant's Leaving the United States on January 22, 1962, and August 18, 1962, Was Not a Departure for Cuba.*

The facts dealing with defendant's leaving on each of the occasions mentioned are set forth in Paragraphs 4 and 7 of the Stipulation. On each occasion, defendant crossed the border of the United States into Mexico with the intention of seeking permission from representatives of the Republic [fol. 69] of Cuba in Mexico City to visit Cuba and *if such permission were granted,* to travel from Mexico City to Cuba. On each occasion the facts are that at the time of the departing from the United States, the defendant "did not have Cuba's permission to enter Cuba." On each occasion she obtained that permission *after ariving in Mexico City.* On the first occasion this was four days after her departure from the United States, and on the second occasion that permission was granted twelve days after she left the United States. It is therefore plain that on each occasion when the defendant left the United States, Cuba was

[File endorsement omitted]

not a country which had agreed to receive her on any basis whatsoever.

For there to be a departure from the United States it must be a leaving for a country which is ready to receive the individual involved. *Heikkinen* v. *United States*, 355 U.S. 273, 276, 2 L.ed.2d 264, 267. One can not depart the country at large so to speak or abstractly; he gets no passport to travel nowhere. One could sail out on the high seas far beyond the territorial limits and need no passport. He needs a passport when he departs for another country. He can not depart to such a country unless that country is ready to receive him.

Thus at the time of her departure this defendant had neither the apparent ability to go to Cuba, nor the actual ability to go there. Whether such ability would ever come into being was unknown and completely beyond her power. In spite of considerable preparation therefor, she is not, and cannot be, guilty of the offense charged. See *United States* v. *Moses*, 205 F.2d 358 (CA 2, 1953) and *Liverman* v. *United States*, 260 F.2d 284 (CA 4, 1958). Both of these cases dealt with the offense of possessing an unregistered still. In each case the still had been installed but was not operable because of the need for repairs and adjustments. Since the offense consisted of possessing an operable still, judgments of conviction were reversed. In the [fol. 70] case at bar, defendant's conduct fell far short of that of the cited cases. Whatever her state of mind was when she left the United States, she factually and legally was unable to go to Cuba until she obtained that country's consent for her entry. She did not have that consent when she left the United States' borders, and she did not even apply for it until after she got to Mexico City. There is nothing to show that she had even an assurance that such consent would be obtained when she applied. The consummation of her preparations rested upon facts and volition utterly independent of her conduct or will. Thus the facts here fall short even of attempt. Cf. *Lemke* v. *United States*, 211 F.2d 73 (CA 9, 1954), cert.den. 347 U.S. 1013, 98 L.ed.

1136; *United States* v. *Coplon*, 185 F.2d 629 (CA 2, 1950). In those cases the defendant had engaged in conduct falling just short of the completion of the crime when his conduct was interrupted by others (e.g., police officers) who sought to frustrate the defendant's criminal purpose. In each case, preparations were extensive and the defendant's criminal purpose could have been accomplished by his own volition and conduct but for the intervention of others. Such is not the situation here where defendant's preparations could not even come close to consummating entry into Cuba, for that turned upon action of the Cuban government utterly independent of defendant.

The facts in the evidence, therefore, do not make out the crime of departure as charged or the lesser offense of attempt to commit that crime.

II. *There Is No Legal Basis for the Restriction on Travel Here Involved and No Legal Basis for Making a Violation of the Restriction a Criminal Offense.*

[fol. 71]

(a) *The regulation here involved (i.e., the "excluding Cuba" amendment of 22 C.F.R. 53.3) was not validly or effectively promulgated as a regulation violation of which is a crime.*

The "excluding Cuba" amendment, promulgated January 16, 1961, was not promulgated under 8 USC 1185(b) or under any statute which makes violation of the Secretary of State's regulations a crime.

It is alleged in the indictment and it has been continuously contended by the government in this proceeding that the "excluding Cuba" amendment was made under the authority of Section 1185(b). That statute, it will be recalled, requires possession of a valid passport for purposes of entry and departure to and from the United States. That requirement is subject to the exception phrased, "except as otherwise provided by the President and subject to such

limitations and exceptions as the President may authorize and prescribe." The quoted language is the source of the rule-making authority allegedly involved here. Actually it was the authority for the rule-making power by which the President, in January, 1953, issued Executive Order 3004 and therein adopted and incorporated as his own earlier regulations issued by the Secretary of State which had been codified as 22 C.F.R. Sections 53.1-53.9. We have heretofore handed to the court a copy of Executive Order 3004. There can be no doubt from the face of it that this Executive Order invokes Section 1185(b) as the source of the authority for the rules contained in 22 C.F.R. Sections 53.1-53.9. See the first Whereas clause, the Therefore clause, and Paragraphs 1, 2 and 5 of the Executive Order. Violations of regulations issued under Section 1185(b) are made a crime by Section 1185(c).

As the regulations (22 C.F.R. Sections 53.1-53.9) were [fol. 72] issued (as the President's regulations) in Executive Order 3004, there was in Section 53.3 no restriction on travel to Cuba. At that time, travel to Cuba did not require a passport any more than travel elsewhere on the Western Hemisphere. The words "excluding Cuba" were inserted into Section 53.3 by the amendment of 1961. (26 Fed.Reg. 482.) A copy of that regulation has been handed to the court. On its face, that regulation shows that it was issued pursuant to authority vested in the Secretary of State by Paragraph 126 of Executive Order No. 7856, dated March 31, 1938 (sic), which in turn had been issued under 22 USC 211a and 5 USC 151c. These two code sections do not deal with the subject matter of Section 1185(b); 22 USC 211a is the statute giving general power to the Secretary of State to issue or provide for the issuance of passports, and 5 USC 151c confers the general rule-making power upon the Secretary of State to make rules and regulations necessary to carry out his functions. *There is no statutory provision making violation of any rules issued under these two sections a crime.*

It is true that at the end of the amended 22 C.F.R. 53.3(b) the amending regulation of January 16, 1961, contains in parentheses this entry: (Sec. 215, 66 Stat 190; 8 USC 1185 and Executive Order 3004 dated January 17, 1953, 18 F.R. 489.) This entry does not convert the regulation into one issued under Section 1185. In the Federal Register itself this entry appears in smaller type than the regulation itself and it has the appearance of an editorial insert by the editor of the Federal Register. In any event it is plain from the body of the amending regulation that it does not recite either 8 USC 1185 or Executive Order 3004 as the express source of its authority.

Public Notice 179 (26 Fed. Reg. 492) which was issued simultaneously with the 1961 amendment, makes it abun- [fol. 73] dantly clear that the Secretary, or his deputy, was not acting under Section 1185(b) in imposing the restrictions and prohibitions on travel to Cuba. Public Notice 179 specifically states that it is issued pursuant to the authority vested in the Secretary under Executive Order 7856, dated March 31, 1938, and 22 USC 211a. There is no reference in Public Notice 179 to Section 1185(b). It is public Notice 179 which completes the restriction effected by the 1961 amendment, for it is in the former that the Secretary declares that United States passports "shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State." It seems plain beyond question that the regulatory scheme adopted in January 1961 (and the one which defendant is charged with having violated) was not, in the mind of the Secretary of State, promulgated under 8 USC 1185 or Executive Order 3004. The parenthetical references to Section 1185 and Executive Order 3004 in the 1961 regulation amendment juxtaposed to the actual statutory recitals of the authority for that amendment indicate the administrative intent not to base the regulation upon the authority of Section 1185.

Moreover, and doubtless conclusively, this has been the government's position in other litigation involving the question of the right of the Secretary to deny passports for

travel to Cuba. In the *MacEwan* and *Zemel* cases[1] the government expressly asserted that the 1961 amendment was issued only under the authority of 22 USC 211a and Execu- [fol. 74] tive Order 7856. See the government's memorandum in *MacEwan*, p. 8.[2] In *Zemel*, Judge Blumenfeld stated in his partial dissent that there the government expressly disclaimed that the 1961 amendment was issued pursuant to 8 USC 1185. (See Opinion, p. 40-A, Appendix C.) If the government should urge here that the 1961 amendment was issued under the authority of 8 USC 1185 it will take a position contrary to that twice taken before other federal courts.

Since the amending regulation of 1961 was not issued by either the President or the Secretary of State pursuant to 8 USC 1185 or Executive Order 3004, that amending regulation was not promulgated under any statute which makes it a criminal offense to violate the regulation. *Per contra*, it was specifically promulgated under statutes (22 USC 211a and 5 USC 151c) which contain no provision making violations of regulations issued under them a crime.

But even should it be deemed a regulation issued under 8 USC 1185, the 1961 amending regulation does not satisfy the requirements of that statute. Section 1185(b) is operative at all only after a Presidential Proclamation meeting the requirements of Section 1185(a). These requirements, so far as relevant here, are that the President determine the existence of a "national emergency" and "find that the interests of the United States require that restrictions and prohibitions . . . be imposed upon the departure of persons from and their entry into the United States." Since this is a criminal statute which trenches upon areas protected by the First Amendment, the rule of strict construc-

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[1] *MacEwan* v. *Rusk*, USDC, E.D. Penna., dec. 3/30/64; opinion appended as Appendix C; *Zemel* v. *Rusk*, USDC, D. Conn., dec. 2/20/64, opinion appended as Appendix D. These cases were discussed upon the argument.

[2] A copy of the memorandum was handed to the court upon the argument.

tion applies in full vigor. See *Kent* v. *Dulles*, 357 U.S. 116, 2 L.ed.2d 1204 (1958). The statute is therefore to [fol. 75] be read as requiring that as to all restrictions and prohibitions imposed upon departure and entry, there be a Presidential finding that the same are "required" by the interests of the United States. This means, as we see it, not simply that the President finds broadly and in the abstract, at large, if you will, that such restrictions and prohibitions are required in the interests of the United States, but that he find that the specific restrictions and prohibitions set forth in the regulations be so required. The findings of January, 1953, found to justify the restrictions and prohibitions set forth in 22 C.F.R. 53.1 (Executive Order 3004), cannot support restrictions and prohibitions of an utterly different kind imposed in 1961. The 1961 amendment contains no finding whatsoever concerning the necessity in the interests of the United States for the restrictions and prohibitions effected by inserting the words "excluding Cuba" into the regulations of 1953. Thus the amendment lacks the finding that the statute makes requisite to the amendment's validity.

There remains the question of whether the rule-making power granted by Section 1185(b) can be validly delegated by the President at all. It is to be noted that Executive Order 3004 *purported to delegate to the Secretary of State* the power to modify and revise the rules (22 C.F.R. 53.1-53.9) issued by the President via that Executive Order. The amending regulation of January, 1961, was issued not by the Secretary of State but by his "Deputy Under-Secretary for Administration." There are strong considerations urging that the power created under Section 1185(b) is not delegable at all and was not intended by the Congress to be delegable to lower officials. The very absence of a standard for executive action (see Point IV, *infra*) results in conferring upon the President an area of virtually unfettered discretion. The rule-making power, while directed at [fol. 76] the relations between this government and its citizens, also affects to some extent the country's foreign rela-

tions. Restrictions upon travel affect constitutional liberties of large social importance. (*Kent* v. *Dulles, supra.*) Finally, if the regulation be adopted pursuant to the authority of Section 1185(b) it defines a crime under Section 1185(c). The exercise of power so gravely affecting the rights of citizens and so related to the country's relations with foreign affairs, and at the same time defining standards of conduct whose violation may constitute a felony, plainly calls for both the judgment and the responsibility of the Presidential office itself. (Cf. *The Presidency and Individual Liberties,* Longaker, Cornell Univ. Press, 1961, pp. 85-87.) We do not deal here with the imperative urgencies of executive administration in wartime where vast subdelegations of power were justified by the need to get the job done. (See, e.g., *Presidential Delegation of Authority in Wartime,* Grundstein, Univ. of Pgh. Press, 1961, *passim.*)

All that is said here is urged with awareness of the provisions of 3 USC 301, 302. We submit that the power of subdelegation there given cannot extend to the powers conferred by Section 1185 as applied in this case. For in that event the Congress will have abdicated even the selection of the official whose judgment defines the crimes which the Congress in Section 1185(c) has created so vaguely. By leaving it to the President's delegee to adopt the restrictions without Congressional standards[3] and to the President to select his delegee in his own discretion, the legislative function exercised by Congress would amount merely to a suggestion that the executive make a law. This is not [fol. 77] the exercise by Congress of a legislative function; it is a Congressional surrender of it.

(b) *The restriction on travel here involved finds no basis in the inherent power of the executive.*

The issue here turns on the distinction between (a) governmental control over travel as an instrument of foreign

[3] See Point III, *infra.*

policy in the relations of this country with other nations, and (b) governmental control over travel in the relationship between this government and its own citizens. The former involves exercise of the executive prerogative. This is a "political" area where the executive operates without judicial review and where the courts have no competence to act. But in the latter no executive power is involved and the government must act in accordance with the law and subject to constitutional limitations protecting the rights of citizens in a free society.

In *Kent* v. *Dulles, supra,* the Supreme Court decided that the distinction here urged was a real one and that where the government acted in the second of the areas above described it must needs have power created by law and observe constitutional limitations. The Court said that the regulation of exit and entry of this country's citizens is not one of the "political questions entrusted to the Chief Executive by the Constitution." (357 U.S. at 129.) It observed that the diplomatic aspects of the passport and its request for safe passage and protection are now "subordinate functions" of the passport. The crucial function of the passport today is "control over exit." "And as we have seen, the right of exit is a personal right included in the word 'liberty' as used in the Fifth Amendment. *If that 'liberty' is to be regulated it must be pursuant to the lawmaking functions of the Congress.*" [Emphasis added.] (357 U.S. at 129.) It further pointed out in the sentence immediately following the one quoted that any exercise of [fol. 78] such power is subject to the usual judicial scrutiny for constitutional infirmity.

We therefore submit that the Court of Appeals for the District of Columbia in the first *Worthy* case (*Worthy* v. *Herter,* 270 F. 2d 905 [CA DC, 1959], cert. den. 361 U.S. 918) and this court in its decision on the motion to dismiss in the case at bar failed to observe a distinction which the Supreme Court has made mandatory in these premises. We deal here not with a political question on which the executive is given unreviewable power of decision, but with

the liberties of a free people which can be restricted, if at all, only pursuant to laws passed by the Congress and then only in accordance with the guarantees of the Bill of Rights.

(c) *Congress in enacting Section 1185(b) did not authorize the executive to impose the limitation here involved on travel to Cuba.*

There is discussed below (Point IV) that the effect of the 1961 amendment to the Presidential regulation (22 C.F.R. 53.3) is in fact and law a provision for censorship over travel to Cuba. The amended regulation does not forbid travel to Cuba. It makes such travel unlawful except when the traveler bears a passport specially validated for such travel.[4] This censorship is effected by combining the 1961 regulatory amendment with the requirements of Public Notice 179. The effect is that in order to travel to Cuba, the citizen must satisfy the Secretary of State that his travel is in the best interests of the United States. What those interests are and the standards for meeting them are not defined. If the citizen gets the passport, the Secretary [fol. 79] has approved the travel. If he doesn't get the passport, the Secretary has disapproved his travel and the travel is frustrated. Neither before nor after the event can the citizen know the basis for the Secretary's action. This is censorship in its crudest form.

We argue here not that the regulation should be struck out because it is censorship (that argument is presented *infra*) but rather that, because the regulation does effect censorship, it plainly invades the area of the First Amendment. For this reason and for the further reason that we deal with a criminal statute, the scope of the statute is to be strictly limited to no more than what its bare words allow.

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[4] Such is the effect of the 1961 amendment when combined with Public Notice 179 and Press Release No. 24; copies are appended to this brief as Appendix A and Appendix B respectively.

On the plain face of the statute there is nothing to suggest the assertion of a power so broad and so contrary to our traditions against censorship. As a matter of unadorned meaning of simple language straightforwardly used, the statute is properly assayed by Judge Smith in *Zemel, supra*:

> "It requires a truly remarkable feat of judicial gymnastics to construe this statute narrowly as a grant of power to invalidate passports for travel to certain countries." (Opinion, App. D., p. 26-A.)

These conclusions are amply supported by the legislative history. At this point we incorporate by reference all that was said under Point 2 of our Memorandum in Support of Defendant's Motion to Dismiss. We present in addition two items of legislative history which cast more light on the Congressional intent upon which Section 1185(b) rests.

In May, 1952, when the 1941 statute predecessor to Section [fol. 80] 1185(b) was in effect,[5] the Secretary of State announced that henceforth it would stamp all passports not valid for travel to Albania, Bulgaria, China, Czechoslovakia, Hungary, Poland, Rumania and the Soviet Union unless specifically endorsed by authority of the Department of State as being valid for such travel. But in the very announcement to that effect, the Department of State was sedulous to point out that its action did not render travel of this kind forbidden. Its precise language was as follows:

> "In making this announcement, the Department emphasized that this procedure in no way forbids American travel to those areas. It contemplates that American citizens will consult the Department or the consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized." (Press Release No. 341, May 1,

[5] The Statute may be found as the Act of 1941, 55 Stat. 252. It was invoked on November 14, 1941, 55 Stat. 1696, and was later extended to April 1, 1963, 66 Stat. 54, 57, 96, 137, 330, 333.

1952; 26 Department of State Bulletin No. 672, May 12, 1952, p. 736.)

As later developed in Congressional hearings, Americans did travel to the countries named above without specifically endorsed passports. No criminal prosecutions followed. When the Senate attempted to inquire exactly what the policy of the Department was, whether the government intended to enforce the restriction on travel to those countries by criminal prosecution, the Department's evasiveness was sharply commented upon by the Senate Committee. (See Hearings Before the Committee on Foreign Relations, [fol. 81] U.S. Senate, 85th Congress, 1st Session, and Department of State Passport Policies, pp. 3, 14, 15, 18, 40, 54, 56, 59, 78.) When, as we pointed out in the Memorandum Supporting Motion to Dismiss, the Congress adopted Section 1185(b) it was on the advice of its Committees that it was merely a reenactment of the 1941 statute in substantially identical terms. This history must of necessity indicate that Congress did not consider Section 1185(b) as imposing the kind of restrictions now sought to be enforced criminally against this defendant.

Another incident illustrates the same thing. Immediately following the *Kent* decision, *supra*, President Eisenhower advised the Congress that in light of that decision there was needed statutory authority to deny passports where their possession would be inimical to the national security. At his request and direction, the Secretary of State submitted a proposed bill which was introduced in the 85th Congress, 1st Session, as § 4110. This proposed legislation contained provisions giving power to deny passports on the grounds just indicated. It provided criminal penalties for travel without such a passport. Although the legislation was before the 85th and the 86th Congresses, it never passed.*

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*The Presidential message can be found at 104 Cong. Record 11849; the House document at H. Doc. No. 417; 3 U.S. Code, Congressional and Administrative News, 85th Cong. 2d sess. 1958, R465.

This last incident was reviewed in a report of the Association of the Bar of the City of New York.[1] Of the Eisenhower message it said, "This appears to have been an honest admission of the lack of statutory power to enforce an area [fol. 82] restriction . . ." On the subject as a whole it stated in part: "The Committee has not discovered any statute which clearly provides a penalty for violation of the area restrictions, and this seems to be a glaring omission. . . ."

Congress had no reason to think that Section 1185 would be used in any manner different from its predecessor statute. Specifically it had every reason to believe that it would not be used in the manner in which it has been invoked against this defendant.

III. *Construed and Applied So as to Authorize the President to Forbid or Censor Travel of Individual Citizens to Cuba, the Statute Delegates Legislative Power Contrary to Article I, Section 8 of the Constitution of the United States.*

It is plain from the face of Section 1185(b) that it contains no standards to guide the President in authorizing and prescribing the limitations and exceptions to the passport requirement. *Kent* v. *Dulles, supra,* specifically and unqualifiedly says that there must be. In the passage noted earlier the Court held that the issuance and denial of passports is not a political matter subject to the inherent powers of the executive. Rather, such issuance is a regulation of individual liberty which can be effected only pursuant to the law-making function of Congress. Then, as if anticipating the very problem in this case, the Court added, "And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests." (357 U.S. at 129.)

Nor are there implied standards governing the Presidential action. It can not be implied from this enactment, for example, that the standard to govern the executive action

[1] Entitled "Freedom to Travel: A Report of the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York."

is whatever best promotes the foreign relations of the United States. For in the first place we deal here not with [fol. 83] control over foreign relations but the regulation of the conduct of citizens. Moreover, as the legislative history reviewed in our Motion to Dismiss so conclusively shows, this statute is a border control statute, a provision for security in wartime and national emergency, not a charter for the conduct of foreign relations. To say that the Presidential action under Section 1185(b) is to be governed by the best interests of our foreign relations is to deny the existence of any standard whatsoever for, as the *Worthy* case observes, in that area the President is governed by no standards imposed by the Congress or by judicial review.

We incorporate by this reference all that was said on this subject under Point 3 of our Memorandum Supporting Defendant's Motion to Dismiss. There the applicable authorities, incidentally also cited in *Kent* v. *Dulles, supra,* are reviewed.

We wish to point out here, in addition to what was said on the Motion to Dismiss, the potential implicit in this prosecution for the assertion of arbitrary power and the subversion of judicial independence. The very lack of legislative standards to govern executive action creates this potential.

We have noted the disparate uses of executive authority in this very area of restrictions on travel under the predecessor statute to Section 1185. It was pointed out, *ante,* that although the State Department announced in 1952 that it would authorize travel to "Iron Curtain" countries only upon passports specifically validated for such travel, the Department went to some pains to make clear that these regulations did not "forbid" travel to those countries. We have also observed the failure of the government to prosecute people who went to those countries without validated passports. We also noted President Eisenhower's message to Congress and his request for further legislation which he said was needed to create the power which is now exerted under a statute no different from the statute then

[fol. 84] in effect. This history is to be particularly observed in light of the frank admissions by the government that its regulatory scheme for censoring travel to Cuba is part of the administration's international political policies to isolate Cuba and effect a hemispheric non-intercourse with that nation. We have handed to the court a copy of the government's memorandum in *MacEwan* v. *Rusk*, Case No. 33038, United States District Court, Eastern District of Pennsylvania, in which this position is stated without qualification. The writers of the instant memorandum have been advised by counsel in the *MacEwan* case and in the *Zemel* case that the government filed identical memoranda in both cases. United States citizens are being refused passports for Cuba today as part of a foreign relations program to isolate Cuba and to bring economic pressures upon that country to change its form of government. It is not the function of this court, and defendant does not ask of it that it do so, to weigh the wisdom or the foolishness, the morality or the immorality, the consistency or inconsistency of such action with this country's treaty obligations, or any other factors which have led the executive to adopt so parlous and potentially explosive a policy. These considerations are truly matters for the political judgment of those in charge of our country's foreign relations. But it is quite another set of considerations for this government to prosecute its citizens who act contrary to rules established to carry out that foreign policy. For in those premises the executive invokes the judicial power. It seeks to have this defendant, for example, convicted of crime and punished by judicial judgment. To the extent that rules invoked against this defendant are vehicles of the foreign policy, as the government has indicated in *Zemel* and *MacEwan, supra*, the government seeks to make the court an effective instrument of executive expediency. [fol. 85] As the lever for invoking such executive expediency, the government employed the grant of arbitrary power, bereft of statutory standards, set out in Section 1185(b).

To maintain its traditional position of independence, to stand as it should between the people and the arbitrary exercise of executive power, the court, we submit, must resist this appeal to expediency. We commend the words of Judge Healy in *Bridges* v. *United States,* 184 F.2d 881, 887 (CA 9, 1950):

> "... and we say now, with all the emphasis we are able to command, that however hard and disagreeable may be the task in times of popular passion and excitement, it is the duty of the courts to set their faces like flint against this erosive subversion of the judicial process."

The *Bridges* case is apposite here. For there the government sought to induce the court to deny a convicted man the statutory right to bail pending appeal because the government asserted that he was in effect convicted of being a Communist, the country was involved in the Korea incident, and his continued freedom was a threat to national security. There the government would have perverted the judicial processes related to the availability of bail. Here the government would resort to the courts to overturn liberties entitled to First and Fifth Amendment protection (as declared by the Supreme Court in *Kent* v. *Dulles, supra*) in order to implement a foreign policy and the power politics of the cold war. The government has seized upon a statute which sets no limit upon executive action in the regulation of its citizens' liberties and exercises that power to achieve political ends as a matter of international expediency. The very absence of statutory standards has created arbitrary power which, in terms of the liberties of our people, has been arbitrarily used. In-
[fol. 86] deed the government has gone so far in this case as to assert that the power exercised here is not even subject to judicial review. Unless the principle confining legislative power to the legislature is observed here, the court is led ineluctably to the point where its powers are enlisted in aid of executive expediency.

IV. *As Construed and Applied Here, the Statute Deprives Defendant of Her Right to Travel Contrary to the First and Fifth Amendments to the Constitution of the United States.*

We have already pointed out how the 1961 amendment, combined with Public Notice 179 and Press Release No. 24, constitutes a regulatory scheme designed for the censorship of the individual's right to travel. *Kent* v. *Dulles, supra,* has held that this right is a liberty protected by the Fifth Amendment and entitled to the protection of the First Amendment. Perhaps the most salient aspect of that liberty is, as the Court pointed out in *Kent* v. *Dulles,* its availability as a direct and indirect source of information needful to the people for meeting the exigencies of their time. Travel permits the individual to see for himself. It permits trained observers to observe and report so that others may be informed. All of this bears directly and immediately upon the democratic process whereby the people, as the repository of sovereignty whose consent is the basis of all government in this country, may reach an informed consensus on the men and measures suitable for the effectuation of their will. As respects Cuba, the informed will of the American people bears upon questions of life and death, not only for themselves but for the planet as a whole. In such a context to say that the American people may know about Cuba only what is in the official handouts is a travesty on the democratic process matching in the macabre the works of Hieronymus Bosch. Indeed to say that they may know only what is reported by those [fol. 87] newsmen and businessmen whose travel to Cuba the proponents of official policy may approve is to offer sources of information only slightly less offensively restricted. It is no answer to the needs of the American people for information on matters so grave to say that they pertain to foreign relations and that policy in these matters may be determined by appointed officials. For this is to give officialdom the means of perpetuating itself and

insulating its policies from public debate. At all events the people through their representatives are entitled to vote on questions of war and peace and certainly to petition their government concerning matters of foreign relations. The travel censorship here invoked substantially clogs the processes whereby our citizens can determine their own positions and exert informed pressure upon their representatives at the seat of government.

Against the background of these considerations, it is helpful to review the facts of record. The Stipulation recites (Paragraph 12) that on each occasion of defendant's travel to Cuba she traveled in and about the Republic of Cuba and observed therein the living and working conditions of the people and the effectuation and implementation of various government programs relating to housing, education, agriculture, industrialization and public health; that she took photographs of what she saw (including Exhibits 1-A through 1-F); that upon her return to the United States defendant appeared before various groups and gatherings of her fellow citizens and reported to them her observations and findings and showed her photographs; and that she wrote descriptions of her trip and her observations in Cuba which she disseminated by mail to friends and acquaintances. Exhibit 2 is a sample of such communications. True it is, as was observed on the oral argument, that defendant's observations are rather enthusiastically [fol. 88] pro-regime, that at the conclusion of her letter she twits herself for writing "such heartfelt propaganda." However one may evaluate the accuracy or the completeness of her observations, they are a report of things observed and they bear vitally on an issue important to United States policy toward Cuba—the support of the Cuban people for their government and their experience in the "War on Poverty." Moreover her listeners and her readers had a plain right to listen to these facts and weigh them in reaching the decisions which they will one day register in the ballot box or by petition to their Congress.

If the exercise of such precious rights is to be balanced against legitimate interests of the government, it would indeed take grave governmental concern to tip the balance against them. First, let it be observed that these liberties are not simply personal. They are those which are inherent in the democratic process created in the Constitution itself. They are the means by which the nexus between the sovereign people and the governmental agent is meaningfully maintained. They are themselves weighted with a profoundly governmental intent. Surely the government's responsibility to protect Americans imprisoned abroad (22 USC 1732) has no weight here. Where circumstances are such that Americans may be mistreated in the area where they want to travel, our government could insist upon the waiver of the citizen's right to this protection as a condition of granting the passport. The government suggested on oral argument that a single individual in a foreign country might engage in conduct that would involve us in war. This is speculative and conjectural. The presence of Soviet troops in Cuba surely can no more create a tinderbox to be set off by ill-advised action of a single American, than the presence of many more Soviet troops in the Soviet Union or middle Europe, and Americans are permitted to travel there. It is easy to conjure up shadowy [fol. 89] images of American citizens engaging in conduct abroad that might create some form of international crisis. But today we permit our citizens to travel to many trouble spots in the world, West Berlin included. This writer is unaware of international incidents created by such travel. Indeed the only incidents that come to mind at this time are those created by misguided aircraft that violate international boundaries without the benefit of passports or other clearance. In balancing First and Fifth Amendment interests against the asserted governmental interest in obviating international incidents, we must weigh realities, facts not turgid prose or labile imaginings. Let the gov-

ernment try to suggest specific facts, not generalities. It has not done so and it can not do so.

Respectfully submitted,

Margolis and McTernan, by John T. McTernan, Co-Counsel for Defendant, and A. L. Wirin, Co-Counsel for Defendant.

[fol. 90]

Appendix A

Public Notice 179

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1962 (44 Stat. 887, 22 USC 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked." (26 Fed. Reg. 492.)

[fol. 91]

Appendix B

Press Release No. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.

[fol. 92] Proof of Service (omitted in printing).

[fol. 93]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

[Title omitted]

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL—Filed April 28, 1964

The plaintiff opposes the defendant's motion for Judgment of Acquittal on the following grounds:

1. The defendant on both occasions departed from the United States in violation of 8 U.S.C. 1185(b).

2. 22 C.F.R. 53.3 was validly and effectively promulgated under 8 U.S.C. 1185.

3. 8 U.S.C. 1185 is not an unconstitutional delegation of legislative power.

4. 8 U.S.C. 1185 is not unconstitutional under the First and Fifth Amendments to the Constitution.

Respectfully submitted,

Francis C. Whelan, United States Attorney;

Thomas R. Sheridan, Assistant United States Attorney, Chief, Criminal Section, Attorneys for Plaintiff, United States of America.

[fol. 94]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION FOR JUDGMENT OF ACQUITTAL

I

Preliminary Statement

The plaintiff opposes the defendant's motion for judgment of acquittal. For convenience sake this opposition

[File endorsement omitted]

will treat defendant's points in the order set forth in defendant's memorandum; however, it is apparent to plaintiff that most if not all of the defendant's contentions have been completely answered by the following cases:

Kent v. *Dulles*, 357 U.S. 116 (1958);
Worthy v. *United States*, 328 F.2d 386 (C.A. 5 1964);
Porter v. *Herter*, 278 F.2d 280 (C.A. D.C. 1960), cert. den. 361 U.S. 918;
Worthy v. *Herter*, 270 F.2d 905 (C.A. D.C. 1959), cert. den. 361 U.S. 918;
Frank v. *Herter*, 269 F.2d 245 (C.A. D.C. 1959), cert. den. 361 U.S. 918;
MacEwan v. *Rusk*, U.S. D.C., E.D. Pa., 3/30/64;
Zemel v. *Rusk*, U.S. D. C., Conn., 2/21/64;
United States v. *Travis*, Memorandum decision of 10/30/63 denying the motion to dismiss the indictment in the instant case.

II

The Defendant's Departures from the United States as Charged in Both Counts of the Indictment and Supported by the Evidence Constitute Violations of U.S.C. § 1185(b).

The facts are clear that on January 22, 1962 and August 18, 1962 the defendant knowingly and willfully departed from the United States for Cuba without a valid passport [fol. 95] for such travel. At the time of each departure the defendant intended to go to Cuba, and each time the defendant went to Cuba. The defendant argues that even though she left the United States with the intent to go to Cuba, her entry into Cuba was dependent upon receiving Cuba's permission to enter Cuba, which is *not* to say that defendant left the United States *without* intending to go to Cuba.

The statute is clear and unambiguous. It makes it an offense for anyone to willfully depart from the United States without bearing a valid passport, that is, a passport valid for travel to the country of destination. The

defendant not only departed from the United States bound for Cuba, but actually went to Cuba on each occasion.

In support of her position the defendant cites the case of *Heikinen* v. *United States*, 355 U.S. 273. There a defendant was indicted for willfully failing to depart from the United States within six months from the time of an alien deportation order. The court recognized in its holding that there is no willful failure to depart until the country willing to receive the alien is identified. The criminal action charged in that case was one of omission rather than one of commission and it is therefore no support for defendant's position. She also cites *United States* v. *Moses*, 205 F.2d 358 (C.A. 2, 1953), and *Liverman* v. *United States*, 260 F.2d 284 (C.A. 4, 1958). Both of these cases deal with the offense of possessing an operable still. Since it was found that the stills were not operable, judgments of conviction were reversed. We fail to see the applicability of those cases to the instant case. She also cites the cases of *Lemke* v. *United States*, 211 F.2d 73 (C.A. 9, 1954), and *United States* v. *Coplon*, 188 F.2d 629 (C.A. 2, 1950), as authority for the proposition that the commission of the crime was prevented by others who sought to frustrate the defendant's criminal purpose. We also do not believe that these cases apply because the type of offenses there involved are not analogous to the instant case.

[fol. 96]

III

22 C.F.R. 53.3 Was Validly and Effectively Promulgated

The defendant's point here is that 22 C.F.R. 53.3 promulgated on January 16, 1961 and excluding Cuba from the list of countries that a citizen may travel to without a passport specifically endorsed for such travel was not validly and effectively promulgated since it was not promulgated under authority of 8 U.S.C. § 1185(b). As authority for this conclusion, defendant states that in the *MacEwan* and *Zemel* cases (*supra*) the Government expressly asserted that this amendment was issued only under the authority of 22 U.S.C. § 211(a) and Executive Order 7856. A

careful reading of the Government's memoranda in these cases will reveal that the Government took the position that the regulation in question was validly issued and amended under the inherent Executive power, 8 U.S.C. § 1185 and 22 U.S.C. § 211(a). But of more import and weight is the case law on this precise point.

Judge Freedman in *MacEwan* (*supra*), in holding that the Secretary of State had the power to and in fact did validly and effectively promulgate the amended regulation, said: "The Secretary of State does not rely solely on inherent Executive power. He claims statutory authority for the regulations he has promulgated. There are two acts of Congress to which the Secretary points as the sources of his power, one is Section 215 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185. The other is the Passport Act of 1926, Section 1, 22 U.S.C. 211(a)." (Memorandum opinion, pages 8, 9)

In the *Zemel* case (*supra*) Judge Clarie, writing for the majority, stated:

"In this case the authority of the Secretary of State is founded on two specific acts of the Congress, namely, the [fol. 97] Passport Act of 1926, 44 Stat. 887, 22 U.S.C. 211(a) and Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185." (Memorandum opinion, page 11)

Judge Clarie also found that the Secretary of State pursuant to the authority contained in Presidential Proclamation 3004, amended Section 53.3(b) of Title 22 C.F.R. (Memorandum opinion page 14)

It is important to note that at the very outset of Section 53 of Title 22 C.F.R., the authority for the promulgation of Section 53 is specifically stated to be 8 U.S.C. 1185. It should also be noted that at the end of 22 C.F.R. 53.3(b), as amended, appears the following: "(sec. 215, 60 Stat. 190; 8 U.S.C. 1185 and Proclamation 3004 dated January 17, 1953, 18 F.R. 489). This clearly indicates that the Secretary of State was relying on the cited statute and

proclamation when he amended Section 53. We have been advised by the State Department that this appears in the amendment as written by the Secretary of State and was not something added as an editorial insert by the editor of the Federal Register as the defendant has indicated in her memorandum.

Thus it is apparent that the amending regulation was promulgated under 8 U.S.C. § 1185 and Executive Order 3004, and as such is a regulation the violation of which is a criminal offense pursuant to statute.

Defendant then makes the additional argument that even if the regulation were promulgated under 8 U.S.C. § 1185 it is not a valid regulation because that statute requires the President of the United States to personally find "that the interests of the United States require the restrictions and prohibitions" and such a finding is absent.

In Executive Order 3004 the President of the United States stated:

> "NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by [fol. 98] virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of Title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States . . . ."

In the same Executive Order, 22 C.F.R. 53.1 to 53.9, as prescribed by the Secretary of State, were specifically adopted and incorporated into the Order, and then the Order continues: "and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require."

Since the Secretary of State has received this authorization by Presidential Proclamation, it is completely unrealistic to argue that the Secretary does not have the au-

thority, but that the President must personally prescribe the necessary restrictions each and every time the necessity therefor arises.

In this regard, the defendant also takes the unique position that the President cannot delegate the rule-making power granted by Section 1185(b) to any one and he must execute it personally. This position completely ignores the plain wording of 3 U.S.C. 301 and 302. By Section 301, Congress gave the President authority to delegate any function which is vested in the President by law and Section 302 states that the authority shall apply to any function vested in the President by law if such law does not affirmatively prohibit delegation of the performance of such function. No such prohibition is contained in Section 1185.

[fol. 99] It may also be noted that the intent of Congress for the President to delegate such functions is strongly indicated by the very wording of Section 1185(b) which states " . . . and subject to such limitations and exceptions as the President may *authorize* and prescribe. . . . " (Emphasis added) That the President authorized the Secretary of State to promulgate the regulation in question seems abundantly clear from the President's expressed grant of such authority in his Proclamation #3004.

In the case of *Scarbeck* v. *United States,* 317 F.2d 546 (C.A. D.C. 1962), cert. den. 374 U.S. 856 (1963), the statute involved was 50 U.S.C. 783(b) which stated in part, "It shall be unlawful for any officer or employee of the United States . . . to communicate . . . to any other person who such officer or employee knows or has reason to believe to be an agent or a representative of any foreign government . . . any information of a kind which shall have been classified by the President (or by the head of any such department . . . with the approval of the President) as affecting the security of the United States . . . . " The information there involved had been classified by the American Ambassador in Warsaw, Poland. The defendant argued that the statute required that the information be personally classified by the President or by the Secretary of State. In rejecting

this contention, the Circuit Court stated, "At the outset, we note that the construction of the statute urged by appellant would largely reduce it to a dead letter. With the pressures of more urgent business, the President and the Secretary of State of necessity could personally classify very few documents or items of information."

As a matter of fact the Secretary of State did make the amendment to 22 C.F.R. 53.3 here in question. We are attaching hereto a copy of a letter from the files of the State Department dated January 16, 1961 from the Administrator, Bureau of Security and Consular Affairs which specifi- [fol. 100] cally states that it was the Secretary of State who instituted the passport requirements for citizen travel to Cuba and invalidating passports for such travel unless specifically endorsed therefor. This letter forwarded the amendment to the Deputy Under Secretary of State for Administration so that he could sign it for the Secretary merely in his administrative capacity. The pertinent portion of that letter reads: "Attached for promulgation by you are the necessary documents to effectuate the Secretary's decision re citizen travel to Cuba." It might be noted that the amendment as it appears in the Federal Register (26 F.R. 482) shows that it was signed by Mr. Henderson "for the Secretary of State."

However, it is our opinion that even if this amendment had been made by the Deputy Under Secretary of State for Administration at the request of the Secretary of State it would be valid since 5 U.S.C. 151(c) specifically gives the Secretary of State the authority to promulgate regulations and *also* the authority to delegate such authority.

The defendant next argues that while the Executive has inherent power to control foreign relations it has no such power to control its own citizens and that such control of its citizens can only be done by the legislative branch of the Government. This contention was completely answered by this court in its memorandum of October 30, 1963, denying the defendant's motion to dismiss the indictment in the instant case, where at page 4 it said, "As observed by the

court in the *Worthy* case, it appears to this court that the President has under his constitutional powers ample authority to conduct foreign affairs and to conduct and prevent war and incident thereto the power to limit travel to Cuba through regulations issued by the State Department. *The conducting of foreign affairs would certainly include the authority to limit travel to certain areas of the world by citizens of this Country without valid passports.*" (Em- [fol. 101] phasis added) And, at page 6, "If the constitutional authority of the President is not sufficient to authorize the limitation on travel to Cuba, then the statute as set forth in Section 1185, Title 8, U.S.C., clearly provides the necessary authority." This same position was taken by the courts in *Frank* v. *Herter*, 269 F.2d 245 (C.A. D.C. 1959), cert. den. 361 U.S. 918; *Porter* v. *Herter*, 278 F.2d 280 (C.A. D.C. 1960), cert. den. 361 U.S. 918, and in the *Zemel* and *MacEwan* cases.

The defendant's final argument on this point is that Congress never intended to authorize the Executive to limit travel to Cuba in such a fashion that disobedience would be criminal. The obvious answer to this is: 8 U.S.C. § 1185, which in fact and law authorizes the President to restrict travel and makes it a criminal offense to violate such restrictions.

Defendant in support of her argument cites from a Public Notice and Press Releases of the State Department and concludes from them that travel to a designated restricted country is not illegal but only travel without a specially endorsed passport for such travel. This is really a distinction without a difference as applied to defendant as she travelled to Cuba twice without a specially endorsed passport for such travel. Defendant does not argue the legal effect of such items as Press Releases and Public Notices, but in any case defendant never applied for a specially endorsed passport for Cuba.

There is an interesting analogy to the law which prohibits a person from engaging in the business of accepting wagers unless he has paid the $50 occupational tax on such

activity. The crime is not being in such business, but rather being in such business without paying the $50 tax. So here, the crime is not in the travel, but in the travel without the specially endorsed passport.

[fol. 102] Defendant states that others have done the same thing and have not been prosecuted for such travel. This is of course no defense even if true, as it is completely immaterial to this case; however, we are constrained to point out that saying that others did the same thing falls far short of being able to prove (as we have done here) that a person willfully travelled in violation of the law.

MacEwan (*supra*, pp. 11, 12), answers the defendant's reliance on subsequent congressional activity not amounting to new legislation when it said that, "the failure of Congress to act does not answer the question of what the existing statutes authorized. For where the power had already been granted by statute, the failure of Congress to enact new legislation amounts to no more than an unwillingness to confirm an already existing power. The request of an Executive for confirmatory legislation may result simply from the practical desirability of avoiding litigation and contest of his power."

IV

8 U.S.C. § 1185 Is Not an Unconstitutional Delegation of Legislative Power, Nor Is It Unconstitutional Deprivation of Defendant's Rights Under the First and Fifth Amendments to the Constitution.

The matters were developed at great length on the defendant's motion to dismiss the indictment and this Court on October 30, 1963 decided these points adversely to the defendant. There is no additional case law cited by defendant or known to plaintiff's attorneys to support the defendant's position since this Court's decision, but there is additional case law to support this Court's decision denying the motion to dismiss (see cases cited, *supra*).

V

Plaintiff respectfully submits that the Court should: deny the motion for judgment of acquittal, find the defendant [fol. 103] guilty as charged in each count of the indictment, and set a date certain for sentencing.

Respectfully submitted,

Francis C. Whelan, United States Attorney;

Thomas R. Sheridan, Assistant United States Attorney, Chief, Criminal Section, Attorneys for Plaintiff.

[fol. 104]

ATTACHMENT TO OPPOSITION

DEPARTMENT OF STATE

Administrator

Bureau of Security and Consular Affairs

January 16, 1961

To: O—Mr. Loy W. Henderson

From: SCA—John W. Hanes, Jr.

Subject: Restrictions on Travel to Cuba

The Secretary has approved restrictions on travel to Cuba. The alien control regulations have been signed by the Secretary and concurred in by the Attorney General. The Secretary approved (January 14) instituting the passport requirement for citizen travel to Cuba and invalidating passports for such travel unless specifically endorsed therefor. (See attached staff paper.)

Attached for promulgation by you are the necessary documents to effectuate the Secretary's decision re citizen travel to Cuba.

Tab A amends 22 CFR 53.3(b) to exclude Cuba from the general exemption from the passport requirement presently applicable to Western Hemisphere countries.

Tab B is a public notice declaring outstanding passports invalid for travel to or in Cuba except the passports of citizens now in Cuba and announcing that passports hereafter shall not be valid for travel to or in Cuba unless specifically endorsed for such travel.

The press release to be issued today states that the Department contemplates making exceptions to these regulations in certain cases such as newsmen and businessmen with previously established business interests.

RECOMMENDATION:

That you sign Tabs A and B.

Attachments.

[fol. 105] Certificate of Service by Mail (omitted in printing).

[fol. 106]

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

[Title omitted]

DEFENDANT'S REPLY MEMORANDUM—
Filed May 6, 1964

Pursuant to leave already given, defendant files this reply to the government's memorandum in opposition to the motion for judgment of acquittal. We answer herein only certain of the points raised by the government, indicating in each instance the government's point to which our argument is directed.

[File endorsement omitted]

I. *Defendant's Leaving the United States on January 22, 1962 and August 18, 1962, Was Not Departure for Cuba. (Answering the government's Point II.)*

The government's argument that on the occasions in question defendant departed for Cuba rests upon two propositions: First, that when the defendant left the United States she intended to go to Cuba; and, second, that after she left the United States she did go to Cuba. This argument misconceives the point. The crime, if any was committed, occurred at the time she crossed the border of the United [fol. 107] States. She could not have departed the United States for Cuba at that time unless she was able to go to Cuba. At that time she was not able to go to Cuba because she had not made application for permission to enter. At the time she crossed our borders, then, the defendant departed for Mexico City, having obtained the permission of the Mexican authorities to enter Mexico to go to Mexico City. Her intent to go on to Cuba is irrelevant unless Cuba was then ready and willing to receive her. That she then later went to Cuba is irrelevant because by that time she had long since crossed the border. Departure for Cuba had to occur at the time she crossed the border; it could not have occurred then because she had no ability to enter Cuba.

In these lights, the *Moses* and *Liverman* cases are directly apposite. The offense charged was possession of the still. By judicial construction, possession was defined as pertaining only to an operable still. The defendants had a still, they intended to use it, but at the time of the arrest it was not operable. They had then no present ability to operate it. They did not violate the law.

Nor did defendant engage in an attempt on either occasion. She had engaged in some preparation to go to Cuba, to be sure. But her preparations had not carried her sufficiently toward the completed offense. What she had done up to the time she crossed our borders did not approach achieving the ability to accomplish her purpose. She had done nothing to obtain the needed permission to enter Cuba, and there is no evidence that she had any reasonable basis

for expecting that when the request for permission was made it would be favorably acted upon. In short at the time she crossed the border of the United States defendant's purpose to enter Cuba had been carried no further than preliminary preparation.

In this context *Lemke* and *Coplon* are helpful and persuasive. They teach that to establish guilt of attempt the [fol. 108] preparation must have been carried to the point where the defendant is close to the point of consummating his purpose. In those cases the consummation of the crime was imminently possible by virtue of the preparations made and was frustrated only by the intervention of law enforcement officers, not by reason of any lack in the defendant's preparations. Here no such preparation plus clear ability to complete the offense exists. For at the time of defendant's crossing of the border of the United States, she could not have departed for Cuba; she had neither obtained nor instituted the steps necessary to obtain the permission of Cuba to enter. Plainly therefore she engaged in some preparation but not enough to constitute attempt.

It must be kept in mind that neither the statute nor the regulation is as clear and unambiguous as the government claims. (Memo, p. 3, lines 7-10.) The regulation (22 C.F.R. 53.3) permits a citizen to leave the United States for Mexico and most of the Western Hemisphere without bearing any passport at all. Defendant had arranged with the Mexican government to enter Mexico on a tourist card. (Stipulation, ¶3, p. 1, line 30 to p. 2, line 3; ¶8, p. 3, lines 8-12.) When she left the United States on each of the occasions charged defendant could have entered but *one country* in the entire world, viz, Mexico. In doing precisely this defendant acted well within the regulations. On both occasions charged this was all defendant could have done. Her preparations had carried her no further up to the time of crossing the border. She had the time and place to reconsider and she had not set in motion a train of preparations that would bring about her ability to enter Cuba.

There was, then, no departure for Cuba. There was a departure for Mexico City, which was lawful, and no more than a mere possibility that later defendant would be allowed to enter Cuba. To permit later conduct bringing about the capability of entering Cuba to relate back to render criminal that which when done was expressly permitted is to render the statute and the regulations fatally [fol. 109] vague. Men of normal understanding can not know what is forbidden and what permitted. *Connally* v. *General Construction Company,* 269 U.S. 385, 391; 70 L.ed. 322, 328; *Small* v. *American Sugar Refining Company,* 267 U.S. 233, 238-240; 69 L.ed. 589, 593-594; *Burstya* v. *Wilson,* 343 U.S. 495; 96 L.ed. 1100; *Winters* v. *New York,* 333 U.S. 507; 92 L.ed. 840; *Niemotko* v. *Maryland,* 340 U.S. 268; 95 L.ed. 267; *Kunz* v. *New York,* 340 U.S. 290; 95 L.ed. 280.

II. *There Is No Legal Basis for the Restriction on Travel Here Involved and No Legal Basis for Making a Violation of the Restriction a Criminal Offense. (Answering the government's Point IV.)*

(a) *The regulation here involved (i.e., the "excluding Cuba" amendment of 22 C.F.R. 53.3) was not validly or effectively promulgated as a regulation violation of which is a crime.*

The government (Memorandum, p. 4, lines 13-18) does not correctly state the position it took in *Zemel* and *MacEwan.* There the government said that the "excluding Cuba" amendment expressly derived its authority from 22 USC 211a and further that the Secretary had inherent power to take this action. So that there may be no doubt of the government's position in that litigation we quote from its memorandum in *Zemel,* pp. 8 and 9 (copy already handed to the court):

"While the Secretary expressly predicated his authority to invalidate passports for travel to Cuba unless such passport is specifically endorsed for such travel under the authority of the Secretary on Sections 124 and 126

of Executive Order No. 7856 issued on March 31, 1958 (3 F.R. 681, 687; 22 C.F.R. 51.75 and 51.77) under the authority of Section 1 of the Act of July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), his inherent power to take such restrictive action is not dependent on any Con- [fol. 110] gressional grant of authority."

We submit that this leaves no reason for doubt. Heretofore the position of the government has been that the "excluding Cuba" amendment was expressly and specifically promulgated upon statutory or other authority *other than* 8 USC 1185. Thus up to this case the government's position has necessarily been that this amendment was not promulgated under a statute which makes violation of the regulations a crime.

Two of the three judges in *Zemel* so understood the government's position and so read the regulation. Judge Smith (dissenting on the merits but agreeing with Judge Clarke on the jurisdiction of the three judge court) said of the government's position: " . . . the defendant [i.e., the Secretary of State and the Attorney General] expressly disclaims reliance upon it [i.e., §1185(b)] here as a source of authority for the regulation excluding travel to Cuba." *Zemel* opinion, p. 31a. Judge Blumenfeld (dissenting on the jurisdiction of the three judge court but agreeing with Judge Clarke on the merits) said that the "Secretary expressly disclaims reliance upon" §1185. *Zemel* opinion, page 40a. Concerning the "excluding Cuba" amendment on its face Judge Smith said, "The regulations themselves did not purport to be based on §215 [§1185]." *Zemel* opinion, p. 26a. Judge Blumenfeld read the regulation thusly:

> "The statute, §211a, has placed the authority to issue passports in the Secretary of State 'under such rules as the President shall designate for and on behalf of the United States.' One of these rules provides: 'The Secretary of State is authorized in his discretion . . . to restrict it [a passport] against use in certain countries.' 22 C.F.R. §51.75 (1949). Under a claim of authority thus derived from §211a, the Secretary imposed a

restriction upon travel to Cuba on January 16, 1961 . . . " (Opinion, p. 36a.)

[fol. 111] In *MacEwan*, Judge Freedman asserted (Opinion, p. 9) that the Secretary "points to" two statutory sources of power, viz., 22 USC 211a and 8 USC 1185. This assertion would not seem to be supported by the government's memorandum quoted earlier. The judge's later observation (Opinion, p. 16) that the Secretary "relies separately for his authority to control travel to Cuba on the Passport Act of 1926, 22 USC 211a" [1] appears more nearly in accord with the government's written position. He finally held that the Secretary had "authority to impose geographical restrictions on the use of passports by virtue of his general power under the Passport Act of 1926." (Opinion, pp. 19-20.)

It would therefore seem that the "excluding Cuba" amendment has, prior to this litigation, been deemed by the government itself to rest solely upon the statutory authority of 22 USC 211a. Most of the judges who heard the government's position and construed the regulation containing the amendment so understood the government and so read the regulation. The position asserted here, that the amendment rests upon 8 USC 1185, is a direct contradiction of positions taken by the government in prior litigation.

The government can derive no support for its present and hastily conceived position from the text of 22 C.F.R. §53. The recitals there of 8 USC 1185 relate back to the original adoption of those regulations by President Truman in 1953. (E.O. 3004.) At that time, the regulation did not contain the "excluding Cuba" language that was added in 1961 by an amending regulation of the Secretary of State, by his Deputy Under-Secretary for Administration. (26 Fed. Reg.

[1] In referring to the promulgation of the "excluding Cuba" amendment, the learned judge makes no reference to the statutory authority (28 USC 211a) and the Executive Order (No. 7856) expressly recited in the regulation itself as the source of its authority. (Opinion, p. 14.)

[fol. 112] 482.) As already observed, the body of this regulation recites its statutory basis to be 28 USC 211a *and that alone.* The parenthetical material is not part of the regulation. It is not referred to in the regulation as the source of its authority or otherwise. Counsel's statement (Government Memorandum, p. 5, lines 14-18) concerning the condition of the regulation "as written by the Secretary of State" (sic) must be rejected and ignored. This is a matter of proof; the evidence has been closed in this case. We do not accept this statement; it can not be considered as an agreed fact in this proceeding. Moreover if there were evidence proffered on the subject it is not competent in its present form. 28 USC 1733(b).

Additionally the "proof" offered by the government (Memorandum, p. 7, line 28 to p. 8, line 11) can not be received at this time for the same reason. The evidence in this case is closed. We do not accept the "evidence" as reflecting the facts. As offered, if the government does offer it as evidence, the document is incompetent because not authenticated. 28 USC 1733(b); Rule 27, Fed. R. Cr. Proc.; *Mullican* v. *United States,* 252 F.2d 398 (CA 5, 1958).

(b) *The restriction on travel here involved finds no basis in the inherent power of the executive.*

The government makes no answer to our argument here. It merely restates formulations which blur the distinction between political determinations by the Executive pursuant to the prerogatives inherent in his position and governmental regulation of travel in the relations between citizen and government. *Kent* v. *Dulles* requires that this distinction be observed and that in the latter area the Executive act only with statutory authority and consistent with the Constitution. We are in such an area in this case, the first *Worthy* case notwithstanding.

[fol. 113]

(c) *Congress in enacting Section 1185(b) did not authorize the Executive to impose the limitation here involved on travel to Cuba.*

The government has attempted no answer to our argument here. We have pointed out the censorship inherent in the "excluding Cuba" amendment and the administrative practices which implement it as set forth in Public Notice 179. This censorship is exercised by means of imposing geographic limitations on the right to travel and requiring specific government approval of travel to that area. We contend that § 1185 confers no authority to impose geographical limitations and that the legislative and administrative history affords no basis for inferring a Congressional purpose to confer power to impose such limitations.

We deal here with Congressional intent and meaning and, as was made plain in *Kent* v. *Dulles*, a statute will be construed where possible to avoid constitutional questions. In the search for the Congressional purpose, Judge Freedman states perhaps the best argument available to the government when he says in *MacEwan*:

> "The language of the statute expressly authorizes restrictions on departure from the United States without a valid passport. If the statute is broad enough to prohibit the departure of a citizen from the United States without a valid passport, it is difficult to see why a partial barrier is not within the statute. If departure may be entirely prohibited, then surely departure may be permitted except to restricted areas, on the familiar principle that the greater necessarily includes the lesser power." (Opinion, p. 10.)

But properly to apply the maxim that the greater includes the lesser one must be sure that each involves the same thing. Here Judge Freedman deals with different things [fol. 114] and the maxim has no application. § 1185 was plainly enacted as border control legislation. The passport

requirement was a device to keep watch over, and where necessary to prevent, the goings and comings of fugitives, lawbreakers and spies. It did this by making passports necessary for departures and entries and thus forcing the identification of travelers and their destinations. This was a measure to protect the internal security of the United States. But only in this sense was § 1185(b) a measure by which travel was "entirely prohibited." It is *toto coelo* a different thing to demark areas of the world off limits to the citizen and permit travel there only on a passport that bespeaks the Secretary's approval of that travel by a particular traveler. This is not the lesser part of the entire prohibition. It is the employment of the entire prohibition for an utterly different purpose. It effects a qualitatively different prohibition for a qualitatively different end. So used the statute becomes a device for censoring the citizen's travel to serve the ends of international policy—to facilitate non-intercourse with Cuba, as the government candidly admits in the memoranda filed in *Zemel* and *MacEwan*.

Thus the reasoning of Judge Freedman results in a construction of the statute which violates elementary canons applicable with especial force to criminal enactments that infringe upon the First Amendment. For this is not a narrow construction. It does not read the statute as requiring passports in a narrow context and to serve but a narrow purpose, all made clear by the Congress. It rather reads the statute as having an amorphous and protean meaning serving not the Congressional purpose but the exigencies of executive policy. It indeed accomplishes what Judge Smith in *Zemel* aptly terms "a truly remarkable feat of judicial gymnastics" by which a prohibition upon a citizen's [fol. 115] entering or leaving the United States in a time of national emergency is converted into a "grant of power to invalidate passports for travel to certain countries." (Opinion, p. 26a.)

Conclusion

For all the reasons heretofore urged, the motion for judgment of acquittal should be granted, the defendant freed and her bond exonerated.

Respectfully submitted,

Margolis and McTernan and A. L. Wirin, by John T. McTernan, Co-Counsel for Defendant.

[fol. 116] Proof of Service by Mail (omitted in printing).

[fol. 117]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MEMORANDUM OPINION ON FINDING DEFENDANT GUILTY AS CHARGED—May 14, 1964

Defendant is indicted on two counts for violation of 8 U.S.C. § 1185(b). The violations consist of defendant knowingly and willfully departing from the United States for Cuba on January 22, 1962, and August 18, 1962, without a valid passport for such travel. It is agreed that on each departure defendant intended to go to Cuba and did go to Cuba. Each of defendant's trips to Cuba was accomplished by going to Mexico City with the intent to obtain authority of Cuban representatives in Mexico to visit Cuba. On each occasion this authority was obtained and, as noted above, Cuba was visited. Defendant urges that although she left the United States with the intent to go to Cuba, her entry into Cuba was dependent on receiving Cuba's

[File endorsement omitted]

permission after arriving in Mexico City and that to violate the statute here involved her departure from the United States must have been for a country which was ready [fol. 118] to receive her. The case of *Heikkinen* vs. *U. S.*, 355 U.S. 273 at 276, and other authorities cited by defendant, do not appear to support this defense.

Section 1185(b) provides in pertinent part:

> "• • • it shall • • • be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

If there is a legal basis for the restriction of travel by the promulgation of 22 C.F.R. 53.3, which excludes Cuba from the list of countries to which a citizen may travel without a passport specifically endorsed for such travel, then the court concludes defendant is guilty of the offenses charged. Defendant argues there is no legal basis for the restriction on travel here involved and no legal basis for making a violation of the restriction a criminal offense. Defendant, by way of argument [pg. 3-10 of her Memo in support of motion for judgment of acquittal], urges that the regulation last above mentioned was not promulgated under 8 U.S.C. 1185(b), which makes violation a crime [1185(c)], but actually under Executive Order 7856 and 22 U.S.C. 211(a) and 5 U.S.C. 151(c) which makes no provision for violation thereof to be a crime. This position of defendant is not supported by the opinion of the District Court in *MacEwan* vs. *Dean Rusk*, [D.C.E.D. Pa. Civil Action No. 33038, decided March 30, 1964] wherein Judge Freedman states at pages 8 and 9 of his opinion:

> "The Secretary of State does not rely solely on inherent executive power. He claims statutory authority for the regulations he has promulgated. There are two Acts of Congress to which the Secretary points as the [fol. 119] sources of his power. One is §215 of the

Immigration and Nationality Act of 1952, 8 U.S.C. §1185. The other is the Passport Act of 1926, §1, 22 U.S.C. §211(a)."

Following this statement, the court, at pages 12-14, outlines the history and contents of the pertinent Presidential proclamations (beginning with President Truman's proclamation No. 2914 on December 16, 1950), regulations prescribed by the Secretary of State and amendments thereto and Public Notice No. 179, referred to by defendant herein.

The MacEwan case, supra, involved an action by plaintiffs therein for declaratory judgment which would declare invalid regulations issued by the Secretary of State (22 C.F.R. 53.3) pursuant to which they were refused endorsement on their passports for travel to Cuba. Both sides moved for summary judgment. Plaintiffs' motion was denied and the defendants' motion granted. In *Zemel* vs. *Dean Rusk*, et al., [D.C. Conn. Civil Action No. 9549, decided February 20, 1964] Judge Clarie, of a three-judge court, writing the majority opinion, observes at page 9:

> "It is this Court's finding that Congress has granted adequate authority to the Executive Department to make these regulations, that their application in this instance does not violate due process and the statutes which authorize the regulations, 22 U.S.C.A. § 211(a) and 8 U.S.C.A. § 1185 are valid and constitutional."

and at page 12:

> "In this case the authority of the Secretary of State is founded on two specific acts of the Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. [fol. 120] §211(a) and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185."

The Zemel case involved an action by plaintiff "• • • for a declaratory judgment and to enjoin the enforcement

and execution of two acts of Congress, namely, the Passport Act of 1926, 44 Stat. 887, 22 U.S.C. § 211(a) and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. § 1185, both of which the plaintiff claims are repugnant to the Constitution." Both plaintiff and defendants moved for summary judgment. Plaintiff's motion was denied and defendants' motion was granted. Two of the judges of the three-judge court sitting on the case filed opinions concurring in part and dissenting in part from the majority opinion of Judge Clarie. Judge Smith disagreed with the view that the area restrictions are authorized and Judge Blumenfeld, although agreeing with Judge Clarie that the area restrictions are a reasonable regulation of travel, did not think the plaintiff was entitled to a construction of 8 U.S.C. 1185 before it is raised in a criminal proceeding.

This court concludes, after considering all of the arguments and examination of documents submitted by the parties, that Title 22 C.F.R. 53.1-9 was promulgated under the authority of 8 U.S.C. 1185 and that the amending regulation (1961) was also promulgated under said section and Presidential Executive Order No. 3004 which was issued under that statute. In Executive Order No. 3004, President Truman clearly found as provided therein "* * * that the interests of the United States require the restrictions and prohibitions, * * *." Said Executive Order adopted and incorporated therein 22 C.F.R. 53.1-9 and authorized the [fol. 121] Secretary of State to "revoke, modify or amend such regulations as he may find the interests of the United States to require." Such delegation of authority is authorized by 3 U.S.C. § 301 and 302. See also 8 U.S.C. 1185(b).

Defendant urges that the restrictions on travel here involved find no basis in the inherent power of the Executive, that the issue here turns on government control over travel in relationship between this Government and its own citizens as distinguished from control as an instrument of foreign policy in the relations of this country with other

countries. This point was considered by this court on defendant's motion to dismiss and the court adheres to its conclusion at that time, that the conduct of foreign affairs would include the authority to limit travel to certain areas of the world by citizens of the country without valid passports.

The other points made by defendant in support of her motion for acquittal are that:

(a) Congress, in enacting 8 U.S.C. 1185(b), did not authorize the Executive to impose the limitations here involved,

(b) Such construction of the statute delegates legislative power contrary to Article I, Section 8, of the Constitution of the United States, and

(c) Such construction deprives defendant of her right to travel contrary to the First and Fifth Amendments of the Constitution of the United States.

As to (a) above, the court is of the opinion that the provisions of Section 1185 are sufficient to impose the penalty therein provided for violation of the limitation of travel to Cuba as set forth above. New legislation is not believed [fol. 122] to be required. See MacEwan, supra, page 12. Points (b) and (c) above were argued by defendant in her motion to dismiss and considered by the court in its Memorandum Opinion filed October 30, 1963, on denying the motion to dismiss and that opinion is hereby adopted and made a part hereof by reference. It is to be noted that following the motion to dismiss in the instant action, further proceedings were delayed pending the rulings of the courts in the MacEwan and Zemel cases, supra. The opinions in those cases, which have not as yet been reported, discuss and rule on most of the points urged by defendant in the case at bar and this court cites those civil actions in support of its conclusions herein.

Defendant depends in substantial part, in support of her position in the instant case, on the opinion of the Supreme Court of the United States in *Kent* vs. *Dulles*, 357 U. S. 116 (1958). The Supreme Court in the Dulles case was concerned with the delegation to the Secretary of State of authority to withhold passports to citizens because of their beliefs and associations. In the opinion of this court, the Kent case is clearly to be distinguished from the situation in the case at bar, as pointed out and discussed in the court's opinion re denying defendant's motion to dismiss, mentioned hereinabove, and that discussion will not be repeated at this time. For additional discussion of Kent vs. Dulles, supra, see also the MacEwan case, supra, pages 3-6, 17-19 and 23, and the Zemel case, supra, at pages 19-22, and cases there cited.

In the recent case of *Worthy* vs. *United States*, 328 F. 2d 386 (1st Cir. Feb. 20, 1964), the court was concerned with criminal liability on the part of the appellant, Worthy, who had *entered* the United States without a valid passport after visiting Cuba. In reversing the District Court, which [fol. 123] held that Worthy had unlawfully entered the United States without a passport in the circumstances, the Court of Appeals observed that an unlawful entry does not include an unlawful departure. At page 393 of its opinion, the court states:

> "If the conviction of the appellant had been for a willful *departure* from the United States without a valid passport we would be confronted with a less difficult problem. A citizen, at an airport or pier, without a passport, can refrain from a violation of the statute by remaining in the country. So doing, the citizen can continue to exercise all of the rights and privileges of citizenship and enjoy the protection afforded to him by constitutions and laws incident to his citizenship." (Emphasis added.)

Also:

"Since Congress has the power to declare a policy with respect to foreign affairs, and to impose reasonable restrictions on the right of the citizen to travel in foreign countries, it follows that it may punish violations of the statute. See Hyde v. Shine, 199 U.S. 62, 25 S. Ct. 760, 50 L. Ed. 90."

Defendant is so insistent that her departure from the United States with intent to go to Cuba (by way of Mexico City) without a valid passport for Cuba does not violate the statute and regulation involved, that further brief comment on the point appears to be in order. It appears obvious that the intent of Congress was to allow the President, through the Secretary of State, to preclude travel to excluded areas or countries in circumstances such as are [fol. 124] here involved. In the opinion of the court, "departure from the United States for Cuba" is tantamount to leaving the United States with the intent to go to Cuba which, it is agreed, the defendant did, and without a valid passport. If the effect of the statute and regulation can be circumvented by a citizen going to another country and there obtaining authority to travel to the excluded country then the intent of Congress would be entirely obviated and the statute and regulation nullified.

The court concludes, after consideration of the stipulation as to facts, the oral argument of counsel and the memoranda of points and authorities filed, that defendant's motion for acquittal should be and is hereby denied, and the court finds the defendant guilty as charged on each of the counts in the Indictment.

Dated: May 13, 1964.

E. Avery Crary, United States District Judge.

[fol. 124a]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

MEMORANDUM RE OPINION AND FINDING OF GUILT—May 14, 1964

The defendant is present with counsel. Court makes statement and finds defendant Guilty as charged in counts 1 and 2. Filed court's memo opinion on finding defendant Guilty as charged and copies are handed to counsel in open court.

Court orders matter referred to the Probation Office for investigation and report and continued to June 22, 1964 at 2:00 P.M. and defendant ordered be present.

(Issued Abstract Probation Office.)

[File endorsement omitted]

[fol. 125]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 32380—Criminal

UNITED STATES OF AMERICA,

v.

HELEN MAXINE LEVI TRAVIS.

JUDGMENT AND COMMITMENT—June 22, 1964

On this 22nd day of June, 1964 came the attorney for the government and the defendant appeared in person and by counsel, John T. McTernan and A. L. Wirin.

It Is Adjudged that the defendant has been convicted upon her plea of not guilty and a finding of guilty of the offense of knowingly and willfully departed from the United States without bearing a valid passport, for the Republic of Cuba, via Mexico, the Republic of Cuba being a place outside the United States for which a valid passport is required by regulations, in violation of Title 8, United States Code, Section 1185(b), as charged in Counts 1 and 2 of the Indictment and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 6 months and that she pay a fine of $500.00 on each of Counts 1 and 2.

It Is Further Adjudged that the sentence of imprisonment of each of said Counts shall run concurrently and that the sentence as to imprisonment only on each of said Counts is suspended and defendant is placed on probation for a period of 2 years on the following terms and conditions: (1) That she pay the fine provided for in this Judgment on each of said Counts in a lump sum or in installments arranged through the Probation Department. (2) That she obey all municipal, state and federal laws. (3) That she comply with the rules and regulations of the Probation Department.

It Is Ordered that execution of this judgment be stayed for 10 days.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

E. Avery Crary, United States District Judge, by Richard F. Janisch, Clerk.

Filed: June 22, 1964, John A. Childress, Clerk.

[fol. 126]

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

[Title omitted]

NOTICE OF APPEAL—Filed June 25, 1964

Name and Address of Appellant: Helen Maxine Levi Travis, 6324 Primrose Avenue, Los Angeles, California 90028.

Name and Address of Appellant's Attorney: John T. McTernan and A. L. Wirin, 3175 West Sixth Street, Los Angeles, California 90005.

Offense: Violation of 8 U.S.C. §1185(b) and 22 C.F.R. §§53.2, 53.3—two counts.

Concise Statement of Judgment or Order, Giving Date and Any Sentence: Adjudged guilty as charged on each of the counts, on May 13, 1963. On June 22, 1964, sentenced to six months imprisonment on each count (sentences to run concurrently) and a fine of $500 on each count; sentence as to imprisonment only suspended and defendant placed on probation for two years; execution of judgment stayed for ten days.

[fol. 127] The above named appellant hereby appeals to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: June 25, 1964.

John T. McTernan and A. L. Wirin, by John T. McTernan, Co-counsel for defendant.

[File endorsement omitted]

[fol. 128] Proof of Service by Mail (omitted in printing).

[fol. 129]

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

[Title omitted]

DESIGNATION OF RECORD ON APPEAL—Filed July 6, 1964

Defendant-Appellant requests that the following be included in the record on appeal in the above entitled cause:

1. The Indictment—6/26/63.
2. Minutes on Arraignment—7/22/63.
3. Waiver of Defendant's Presence—9/30/63.
4. Defendant's Motion to Dismiss Indictment—9/9/63.

[File endorsement omitted]

5. Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss—9/9/63.

6. Minute Orders (2)—9/9/63.

7. Plaintiff's Opposition to Motion to Dismiss—10/8/63.

8. Minute Order—10/14/63.

9. Defendant's Reply to Opposition to Defendant's Motion to Dismiss—10/18/63.

10. Minute Order—10/21/63.

11. Minute Order—10/28/63.

[fol. 130] 12. Memorandum Opinion and Order Denying Defendant's Motion to Dismiss—10/30/63.

13. Waiver of Jury Trial—4/6/64.

14. Stipulation of Facts, Including All of the Exhibits.

15. Defendant's Motion for Judgment of Acquittal.

16. Defendant's Memorandum Supporting Motion for Judgment of Acquittal, Including Appendices A and B and Omitting Appendices C and D.

17. Plaintiff's Opposition to Defendant's Motion for Judgment of Acquittal—4/28/64.

18. Defendant's Reply Memorandum—5/6/64.

19. Memorandum Opinion Finding Defendant Guilty as Charged—5/14/64.

20. Order Finding Defendant Guilty as Charged—5/14/64.

21. Judgment and Sentence—6/22/64.

Dated at Los Angeles, California, June 30, 1964.

John T. McTernan and A. L. Wirin, by John T. McTernan, Co-Counsel for Defendant-Appellant.

[fol. 131] Proof of Service by Mail (omitted in printing).

[fol. 133]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Title omitted]

STATEMENT OF POINTS ON APPEAL—Filed October 15, 1964

The points upon which defendant-appellant will rely on appeal are:

1. There is no legal basis for the restriction on travel here involved and no legal basis for making a violation of the restriction a criminal offense.

(a) The regulation here involved (i.e., the "excluding Cuba" amendment of 22 C.F.R. 53.3) was not validly or effectively promulgated as a regulation violation of which is a crime.

(b) The restriction on travel here involved finds no basis in the inherent power of the executive.

(c) Congress in enacting Section 1185(b) did not authorize the executive to impose the limitation here involved on travel to Cuba.

2. Construed and applied so as to authorize the President to forbid or censor travel of individual citizens to Cuba, [fol. 134] the statute delegates legislative power contrary to Article I, Section 8 of the Constitution of the United States.

3. As construed and applied herein, to authorize the Executive Department to prohibit travel to Cuba or in any way limit travel on a geographic basis, the statute (8 USC 1185[b]) is fatally vague contrary to the First and Fifth Amendments to the Constitution of the United States.

4. As construed and applied here, the statute deprives appellant of her right to travel contrary to the First and Fifth Amendments to the Constitution of the United States.

5. The statute and the regulations thereunder, as applied here, are unreasonable and capricious and deprive appellant of liberty without due process of law and can not be justified by the Presidential Proclamations of 1950 and 1953. [Procl. No. 2914, 64 Stat. A 454; Procl. No. 3004, 67 Stat. C 31.]

Dated: This 15th day of October, 1964.

A. L. Wirin, John T. McTernan, by John T. McTernan, Attorneys for Defendant-Appellant.

[fol. 135] Certificate of Service by Mail (omitted in printing).

[fol. 137]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ORDER OF SUBMISSION—April 1, 1965

This cause coming on for hearing, John T. McTernan, argued for the appellant, and Robert L. Keuch, Attorney, Department of Justice, argued for the appellee, thereupon the Court ordered the cause submitted for consideration and decision.

[fol. 138]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Title omitted]

ORDER REVOKING SUBMISSION

The order submitting the above matter this day made is hereby revoked, and the matter will await the decision of the Supreme Court in Zemel vs. Rusk (No. 86 in the current term) argued 3/1/65.

After such determination an appropriate order will be made either submitting the case, or calling for further oral argument, or written briefs, as counsel may desire and this Court orders.

4/2/65

cc: Manuel Real, U. S. Atty.
J. Walter Yeagley, Asst. Atty. Gen.
John T. McTernan, Atty. at Law

[File endorsement omitted]

[fol. 139]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—November 19, 1965

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

[fol. 140]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 19,628

HELEN MAXINE LEVI TRAVIS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

OPINION—November 19, 1965

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Koelsch, Circuit Judges; and Powell, District Judge.

PER CURIAM:

This appeal is from a judgment and conviction for violation of 8 U.S.C. §1185(b) and the regulations thereunder, Sections 53.1 through 53.9, Title 22, Code of Federal Regulations as amended. The indictment in two counts charged that on January 22, 1962, and August 18, 1962, the appellant knowingly and willfully departed the United States for Cuba without a valid passport for such travel. A jury trial was waived and appellant was tried by the court on an agreed Stipulation of Facts.

Appellant is an American citizen. At all times pertinent and material she did not bear a valid United States passport specifically endorsed for travel to Cuba. Appellant had knowledge of the provisions of 8 U.S.C. §1185(b) and 22 CFR 53.2 and 53.3. Appellant made two trips to Cuba from the United States, both via Mexico. She obtained permission of the Cuban government to enter Cuba after her arrival in Mexico. On both occasions of her departure from

the United States it was appellant's intention to travel to Cuba.

Zemel v. *Rusk*, 381 U.S. 1, was decided by the Supreme Court in May, 1965, after this case had been argued. It was [fol. 141] a civil action brought to compel the Secretary of State to issue a valid passport for travel to Cuba. The plaintiff there sought to enjoin the enforcement of the same criminal statute and regulations under which appellant here was convicted. The area restrictions on the issuance and use of passports were held constitutional and an authorized delegation of authority to the President and Secretary of State. 381 U.S. pages 7 through 13. The court declined to pass on the request to enjoin the enforcement of 8 U.S.C. §1185(b). It stated:

> "* * * We hold that on either interpretation of the complaint, the court below was correct in refusing to reach the issue of criminal liability.
>
> "* * * For if we are to avoid rendering a series of advisory opinions, adjudication of the reach and constitutionality of §215(b) must await a concrete fact situation. * * *" Zemel v. Rusk, 381 U.S. 1, at 19, 20.

Appellant attacks the statute, 8 U.S.C. §1185[1] as not authorizing area restrictions, being void as vague and not [fol. 142] being cited in the promulgation clause of the amendment to the regulations which is referred to as the "Excluding Cuba" regulation. (22 CFR 53.3).

---

[1] "(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

* * *

[*Continued on next page*]

Area restrictions have long been used and are recognized as valid. 381 U.S. pages 7 through 13. Section 1185 made it unlawful to depart for Cuba without a valid passport in violation of 22 CFR 53.1-53.9, as amended. A reading of the statute and the regulations demonstrates the plain and unambiguous meaning to be that a person is subject to criminal penalties on leaving the United States for Cuba without a valid passport. That appellant knew this is agreed in the stipulation. The "Excluding Cuba" regulation is an amendment and as originally promulgated, 22 CFR 53.1-53.9, made specific reference to 8 U.S.C. §1185. We consider the statute and regulations valid against appellant's attack. *United States* v. *Healy,* 376 U.S. 75, 82, N. 7; *Worthy* v. *Herter,* 270 F. 2d 905, 912 (D.C. Cir. 1959); *Porter* v. *Herter,* 278 F. 2d 280, 282 (D.C. Cir. 1960); *Worthy* v. *United States,* 328 F. 2d 386 (5 Cir. 1964).

Appellant contends hers was not a departure for Cuba as she did not have that country's consent to enter Cuba when she left the United States. Possible fact situations, including the one here, are suggested in *Zemel* v. *Rusk,* 381 U. S. 1, 19. It is our opinion that appellant did depart from the United States for Cuba without a valid passport in violation of 8 U.S.C. §1185(b). We adopt a portion of the opinion of the trial court:

"Citizens

(b) After such proclamation as is provided for in sub-section (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

"Penalties

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; • • • ."

"In the opinion of the court, 'departure from the United States for Cuba' is tantamount to leaving the United States with the intent to go to Cuba, which, it is agreed, the defendant did, and without a valid passport. If the effect of the statute and regulation can be circumvented by a citizen going to another country and there obtaining authority to travel to the excluded country then the intent of Congress would be entirely obviated and the statute and regulation nullified." (T. 123)

We affirm.

[fol. 143]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 19,628

HELEN MAXINE LEVI TRAVIS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—November 19, 1965

Appeal from the United States District Court for the Southern District of California Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is .....

Filed and entered Nov. 19, 1965.

[fol. 144]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING—
January 4, 1966

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant filed December 17, 1965, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[fol. 145] Clerk's Certificate (omitted in printing).

[fol. 146]

SUPREME COURT OF THE UNITED STATES

No. 963, October Term, 1965

HELEN MAXINE LEVI TRAVIS, Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—April 18, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.